Notes

Federal Jurisdiction Over Declaratory Judgment Proceedings In Patent Cases[1]

X, a New York manufacturing corporation, brought suit in a federal district court against *Y*, a competing New York corporation, alleging that Y was interfering with *X's* right to do business by circularizing *X's* customers with claims that *X* was infringing certain of *Y's* patents, and further by threatening to sue those customers for infringement; that the patents *Y* thus claimed to be infringed were invalid; and that *Y's* acts were done in bad faith, and therefore constituted unfair competition. *X* requested a declaration[2] that the patents under color of which *Y* was attacking *X's* business were void, and in addition sought a preliminary injunction against the alleged acts of unfair competition. There being no diversity of citizenship, *Y* insisted that the court had no jurisdiction to grant an injunction against unfair competition, since a case based on that issue alone concededly does not present a federal question. Following several earlier lower court decisions,[3] the court assumed that *X's* complaint as to the validity of *Y's* patent presented a case "arising under" the patent laws and therefore satisfied the requirement of a federal question. Following the argument of *Hurn v. Oursler*,[4] the court then held that *X* was asserting a single cause of action for *Y's* interference with *X's* right to do business, supported on two grounds, one the federal ground that *Y's* patents were void, and the other the non-federal ground of unfair competition. After indicating that the federal ground was substantial on its merits, the court took jurisdiction of the entire case and granted a preliminary injunction as an appropriate remedy in the non-federal phase of the controversy.[1]

The court's conclusion that a non-patentee presents a federal question by alleging that its competitor's patent is invalid might seem on its face to be a departure from a well established rule. In delimiting the jurisdiction given by statute to the federal courts over cases "arising under" federal laws,[5] the Supreme Court has made it clear that the statutory grant is to be narrowly construed, and that in order to establish federal jurisdiction on this ground, the federal question must be presented by the plaintiff's original cause of action rather than by the defendant's answer or by subsequent pleadings.[6] Nor can the plaintiff successfully invoke federal jurisdiction by

1. Mitchell & Weber, Inc. v. Williamsbridge Mills, Inc. & Hyman (S. D. N. Y., March 18, 1936) (opinion by Patterson, D. J.).

2. The plaintiff proceeded under the Federal Declaratory Judgments Act. 48 Stat. 955 (1934), 28 U. S. C. A. § 400 (1935).

3. Zenie Bros. v. Miskend, 10 F. Supp. 779 (S. D. N. Y. 1935), noted (1935) 45 Yale L. J. 160; Automotive Equipment v. Trico Products Corp., 11 F. Supp. 292 (W. D. N. Y. 1935); Lionel Corp. v. De Filippis, 11 F. Supp. 712 (E. D. N. Y. 1935). And compare Webster Co. v. Society for Visual Education (C. C. A. 7th, 1936), 3 U. S. L. Week, April 14, 1936, at 774, col. 2. For a discussion of these cases see Borchard, *Recent Developments in Declaratory Relief* (1936) 10 Temp. L. Q. 233, 246-248.

4. 289 U. S. 238 (1933).

5. The federal courts are given jurisdiction over cases arising under the laws of the United States. 36 Stat. 1091 (1911), 28 U. S. C. A. § 41 (1) (1926). They are likewise given jurisdiction over cases arising under the patent, the copyright, and the trade-mark laws. 36 Stat. 1092 (1911), 28 U. S. C. A. § 41 (7) (1926). The cases are hereinafter cited interchangeably.

6. Metcalf v. Watertown, 128 U. S. 586 (1888); Tennessee v. Union & Planters' Bank, 152 U. S. 454 (1894); Smith v. Kansas City Title & Trust Co., 255 U. S. 180 (1921); see Dobie, Federal Jurisdiction and Procedure (1928) § 61.

anticipating a defense involving a federal question and incorporating into his complaint an allegation that the anticipated defense is invalid.[7] Furthermore, it is frequently stated that in order to present a federal question within the foregoing rules, the plaintiff's original cause of action must be founded on some right accruing to him by virtue of a federal law.[8] Under this refinement of the rule, there was no basis for federal jurisdiction in the principal case, since the plaintiff, a non-patentee, did not claim a right conferred on him by the patent law,[9] but rather sought to establish that the defendant had no rights under that law.

But it can be contended that a case "arising under" the federal laws is presented even though the plaintiff does not claim for himself a right conferred by one of those laws if, as in the present case, an essential ingredient of the plaintiff's original cause of action is the non-existence of such a right in the defendant: if, that is, the plaintiff's complaint, properly stated without the aid of anticipated defenses, makes inevitable an adjudication as to the existence of that right.[10] On several occasions, the Supreme Court has laid down a sufficiently broad definition of the statutory grant of jurisdiction to warrant this conclusion.[11] And it finds particularly strong support in the cases involving a bill to quiet title to real property, where the defendant claims title by virtue of a federal grant or statute. There the allegation that the defendant is asserting his claim and that the claim is invalid is called an essential element of the plaintiff's cause of action, and such an allegation is apparently sufficient to invoke federal jurisdiction.[12] Although these cases cannot be

7. Tennessee v. Union & Planters' Bank, 152 U. S. 454 (1894); Louisville & N. Rr. Co. v. Mottley, 211 U. S. 149 (1908); see DOBIE, loc. cit. *supra* note 6.

8. ". . . a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." Louisville & N. Rr. Co. v. Mottley, 211 U. S. 149, 152 (1908). And see Tennessee v. Union and Planters' Bank, 152 U. S. 454, 461 (1894); Venner v. New York Central Rr. Co., 293 Fed. 373, 374 (C. C. A. 6th, 1923).

9. It seems an extension of the cases to argue that the plaintiff's interest is conferred on him by the patent laws. Cf. American Well Works Co. v. Layne Co., 241 U. S. 257, 260 (1916).

10. The uncertainty on the face of the pleadings as to whether the defense would raise a question under a federal law provided one of the reasons often asserted for the rule prohibiting the anticipation of a defense as a means of invoking federal jurisdiction. Thus in Taylor v. Anderson, 234 U. S. 74 (1914), the Court said at 75: "Apparently, their purpose was to anticipate and avoid a defense which it was supposed the defendants would interpose, but, of course, it rested with the defendants to select their ground of defense, and it well might be that this one would not be interposed." This uncertainty obviously does not exist in the instant type of case.

11. A case arises under the laws of the United States "where an appropriate statement of the plaintiff's cause of action, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of a law of Congress." Hopkins v. Walker, 244 U. S. 486, 489 (1917). And see Starin v. New York, 115 U. S. 248, 257 (1885); Metcalf v. Watertown, 128 U. S. 586, 589 (1888); Cooke v. Avery, 147 U. S. 375, 384, 385 (1893); Pratt v. Paris Gas Light Co., 168 U. S. 255, 259 (1897); Devine v. Los Angeles, 202 U. S. 313, 333 (1906); First Nat'l Bank v. Williams, 252 U. S. 504, 512 (1920). But see Venner v. New York Central Rr. Co., 293 Fed. 373, 374 (C. C. A. 6th, 1923).

12. Hopkins v. Walker, 244 U. S. 486 (1917); see Jackson v. Gates Oil Co., 397 Fed. 549, 551 (C. C. A. 8th, 1924); Boston & Montana Consol. Copper & Silver Mining Co. v. Montana Ore Purchasing Co., 188 U. S. 632, 640, 641 (1903); Barnett v. Kunkel, 264 U. S. 16, 20, 21 (1924).

regarded as conclusive, because the plaintiff, as well as the defendant, typically bases his claim to the property on a federal grant or statute, they are of considerable force, since a claim of title under federal statute by the plaintiff does not alone justify the exercise of federal jurisdiction.[13] If this broader statement of the rule is correct, the plaintiff in the principal case presented a proper case for the exercise of federal jurisdiction by alleging that the defendant's patents were invalid, even though his interest in obtaining this declaration was not conferred by the patent law. For although prior to the Declaratory Judgments Act no separate cause of action existed in which the invalidity of the defendant's patent was an essential ingredient of the plaintiff's cause rather than an anticipated defense,[14] the Act enables the plaintiff to state an original cause of action which is directly based on the invalidity of the defendant's patent, since it permits a proceeding to determine "legal relations," thereby, it is said, allowing the plaintiff to state a justiciable case by alleging that the defendant has a no-right.[15]

Even if a federal court has jurisdiction to decide the validity of the patent, its jurisdiction over the claim for unfair competition remains open to question. A somewhat analogous situation is presented where, in the absence of diversity of citizenship, a patentee sues in a federal court, joining a claim for infringement with one for unfair competition. In such a situation, it is said that the claim for unfair competition can be adjudicated only if it is part of the same cause of action as the infringement claim.[16] If this test is applied to the instant case, the existence of jurisdiction over the claim for unfair competition depends on whether that claim and the request for the declaratory judgment can be treated as two grounds supporting

13. Blackburn v. Portland Gold Mining Co., 175 U. S. 571 (1900); see Barnett v. Kunkel, 264 U. S. 16, 20 (1924).

14. For example, a suit by a patentee for slander of title founded on the fact that the defendants, also patentees, were asserting that their patent was being infringed by the plaintiff, does not present a federal question. American Well Works Co. v. Layne Co., 241 U. S. 257 (1916). The Court said in that case at 259: "It is no part of it [i.e. the plaintiff's case] to prove anything concerning the defendants' patent or that the plaintiff did not infringe the same . . ."

15. See BORCHARD, DECLARATORY JUDGMENTS (1934) 17-19, 135-137.

16. Where the infringement claim was sustained there had been conflict as to whether jurisdiction existed to grant relief for unfair competition at all. A majority of the courts granted such relief if the claims together constituted but one cause of action. Payton v. Ideal Jewelry Mfg. Co., 7 F. (2d) 113 (C. C. A. 1st, 1925) (as "aggravation" of the damages for infringement); Lovell-McConnell Mfg. Co. v. Auto Supply Mfg. Co., 193 Fed. 658 (C. C. E. D. N. Y. 1911) (as "a phase of the issue of infringement"); Climax Lock Co. v. Ajax Hardware Co., 192 Fed. 126 (C. C. W. D. N. Y. 1911) (as "incidental to the charge of infringement"); Badger v. Badger & Sons Co., 288 Fed. 419 (D. Mass. 1923) (as "arising out of" the infringement claim). *Contra:* Planten v. Gedney, 224 Fed. 382 (C. C. A. 2d, 1915); Recamier Mfg. Co. v. Ayer, 59 F. (2d) 802 (S. D. N. Y. 1932). Where the infringement claim was decided adversely to the plaintiff, however, most courts refused to entertain the claim for unfair competition. Elgin Nat. Watch Co. v. Ill. Watch Case Co., 179 U. S. 665 (1901); Leschen Rope Co. v. Broderick Rope Co., 201 U. S. 166 (1906); see Standard Paint Co. v. Trinidad Mfg. Co., 220 U. S. 446, 460 (1911); cf. Geneva Furniture Mfg. Co. v. Karpen, 238 U. S. 254, 259 (1915). But cf. Woods Sons Co. v. Valley Iron Works, 166 Fed. 770, 771 (C. C. M. D. Pa. 1909). But in Hurn v. Oursler, 289 U. S. 238 (1933), the Court held that jurisdiction over the claim for unfair competition existed even in such a case if the single cause of action test was met. For a discussion of the case, see Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936) 45 YALE L. J. 397-410.

a single cause of action.[17] It does not appear entirely clear that they can be so treated. For the Supreme Court has held that in deciding jurisdictional questions, a cause of action is to be defined as the violation of a single right, and not more generally as a set of operative facts giving rise to a right.[18] The application of this definition to conventional forms of proceedings leads to results which are difficult enough to predict,[19] but it is of practically no value as a criterion when applied to proceedings for the declaration of legal relations.[20] If, however, this definition is to be employed in such proceedings, its requirements should be considered satisfied in the instant case. For the controversy here presented is closely analogous to one in which a patentee sues for infringement, the defendant sets up the invalidity of the patent as a defense, and as an equitable counterclaim, seeks an injunction against continued acts of unfair competition consisting of threats of infringement suits. Even in the absence of diversity of citizenship, the federal courts exercise jurisdiction over the counterclaim as a claim arising out of the transaction which is the subject matter of the suit.[21] Such a case appears to be identical with the instant one, save that the former defendant is now in the position of a plaintiff. Since jurisdiction in

17. Judge Patterson apparently considered that the single cause of action test had been met. But it appears important that the plaintiff state his two claims as a single cause of action. For in Zenie Bros. v. Miskend, 10 F. Supp. 779 (S. D. N. Y. 1935), although a factual situation almost identical with that in the instant case was presented, Judge Patterson felt compelled to dismiss the claim for unfair competition for want of jurisdiction. In the principal case, he distinguished that decision on the ground that the plaintiff there pleaded each claim as a separate cause of action.

18. Hurn v. Oursler, 289 U. S. 238, 246 (1933); cf. POMEROY, CODE REMEDIES (5th ed. 1929) § 347; McCaskill, *Actions and Causes of Action* (1925) 34 YALE L. J. 614. But cf. CLARK, CODE PLEADING (1928) § 19. And see *infra* note 19.

19. For example, the unlawful production of a copyrighted play and of an uncopyrighted version of the same play constitute invasions of two separate and distinct rights. Hurn v. Oursler, 289 U. S. 238 (1933). See the discussion in Shulman and Jaegerman, *supra* note 16, at 399-400.

20. If a strict Hohfeldian analysis is made of the principal case, the plaintiff's request for a declaratory judgment did not assert the violation of a right at all, but merely sought to establish that the defendant had a no-right under the patent laws and that the plaintiff had a correlative privilege to do business. It is possible to argue, however, that the Declaratory Judgments Act, by permitting a judicial declaration of legal relations of this nature and providing for supplementary relief, turns the plaintiff's privilege to do business into a right in the sense that it is a claim which the courts will enforce. The declaratory proceeding might therefore be considered as merely a request for relief for the invasion by the defendant of the plaintiff's right to do business, the same cause of action as that for unfair competition.

21. Kaumagraph Co. v. General Trade-Mark Corp., 12 F. Supp. 230 (S. D. N. Y. 1935); General Electric Co. v. Fansteel Products Co., 5 F. Supp. 828 (S. D. N. Y. 1931); Chernow v. Cohn & Rosenberger, Inc., 5 F. Supp. 869 (S. D. N. Y. 1934). *Contra:* United States Bolt Co. v. Kroncke Hardware Co., 234 Fed. 868 (C. C. A. 7th, 1916). In Moore v. N. Y. Cotton Exchange, 270 U. S. 593 (1926), there being no diversity of citizenship, plaintiff invoked federal jurisdiction under the anti-trust laws, and defendant set up a counterclaim for unfair competition. The Court entertained the counterclaim, and it is upon this decision that the cases cited above are based. Of course jurisdiction in these cases is not dependent on the fact that Equity Rule 30 authorizes the federal courts to entertain a "counterclaim arising out of the transaction which is the subject matter of the suit," since this Rule cannot enlarge federal jurisdiction. See Hurn v. Oursler, 289 U. S. 238, 242 (1933).

each case must be derived from the same statutory grant, the federal courts may be said to have jurisdiction over the non-patentee's claim for unfair competition when he is a plaintiff as well as when he is a defendant.

Once it is established that the claim for unfair competition can be entertained at all in the non-patentee's action to declare a patent invalid, it seems proper to grant a remedy for it in the form of a preliminary injunction, on the usual grounds for preliminary relief, even before the validity of the patents is finally determined, since a permanent injunction could conceivably issue against the unfair competition once federal jurisdiction has been established, even though the claim as to the validity of the patents is decided adversely to the plaintiff.[22] This conclusion is likewise supported by the fact that in cases where a patentee sues for infringement, and the defendant counterclaims for unfair competition, the defendant can apparently obtain a preliminary injunction against the unfair competition before the plaintiff's claim is adjudicated.[23]

The ultimate resolution of the foregoing problems will probably depend largely on considerations of policy, and in this respect, the result in the principal case appears desirable. It is true that the decision effectuates an expansion of federal jurisdiction, since it not only permits the federal courts to entertain a suit by a non-patentee to determine the validity of a patent, a proceeding not cognizable before the Federal Declaratory Judgments Act as a case arising under the patent laws, but also allows the introduction into the federal courts of a suit by a non-patentee for unfair competition, which hitherto could have been maintained only in the state courts, unless diversity of citizenship was present. But the usual objections to an expansion of federal jurisdiction do not appear particularly persuasive in the type of case here presented. There is no compelling reason to fear that the exercise of federal jurisdiction over the claim for unfair competition will create friction between the federal judiciary and the state governments. Such fears are based largely on the doctrine of *Swift v. Tyson*[24] to the effect that in matters of commercial law or general jurisprudence, the federal courts in the exercise of their original jurisdiction are free to determine questions of state law independently of—even contrary to—the state courts. But no serious friction could result from the application of this doctrine in the instant type of case, since there is no known conflict between state and federal courts in their interpretations of the state common law regarding unfair competition.[25] Nor should blanket objections to any expansion of federal jurisdiction based on solicitude for the power of the states or on the dangers of overburdening the courts be controlling. In achieving a proper balance between the respective judiciaries of state and nation, emphasis should be placed on the purposes to be effectuated by a particular apportionment of judicial power rather than on mechanical objections to all increases in the business of the federal courts. The latter tribunals have long exercised exclusive jurisdiction over patent litigation and should therefore be sub-

22. Cf. Hurn v. Oursler, 289 U. S. 238 (1933).

23. Cf. Moore v. N. Y. Cotton Exchange, 270 U. S. 593 (1926). It has been suggested that the injunction against unfair competition could be granted under Section 2 of the Declaratory Judgments Act which provides: "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper." See Automotive Equipment v. Trico Products Corp., 11 F. Supp. 292, 294 (E. D. N. Y. 1935). Whether or not such a theory would be permissible, it could have no application in the principal case since the request was for a preliminary injunction to issue prior to the determination of the claim for a declaratory judgment.

24. 41 U. S. 1 (1842). For a discussion of the doctrine, see Shulman and Jaegerman, *supra* note 16, at 402-410.

25. See Shulman and Jaegerman, *supra* note 16, at 403.

stantially better qualified than the state courts to deal with this highly technical field of law.[26] It therefore appears desirable that they entertain the instant type of controversy, which involves a final determination of the validity of a patent. The jurisdictional result in the present case will perhaps seem questionable to those whose abiding concern is to make constitutional litigation procedurally as difficult as possible, in order to confine the scope of judicial review;[27] but their fear seems to be addressed rather to the Declaratory Judgments Act itself, which apparently makes it possible to state valid causes of action at an early stage in a controversy, than to the recognition of a federal question in a suit where the plaintiff asserts that he has a justiciable interest in the invalidity of the defendant's claim under a federal statute.

REMARRIAGE OF SPOUSE AFTER VOID FOREIGN CONSENT DECREE AS GROUND FOR DIVORCE IN NEW YORK[1]

IT IS well settled that full faith and credit must be given to a divorce granted either in a state which contained the "matrimonial domicil"[2] and in which the libellant was still domiciled at the time of the divorce,[3] or in any state in which the libellant was domiciled and the respondent has been personally served or has appeared.[4] But if, in the latter case, the respondent has not appeared or been personally served,[5] or, although both parties have appeared, if neither party was domiciled within the jurisdiction which granted the divorce,[6] the decree, like that of a court of another country,[7] is recognized, if at all, only as a matter of comity. Foreign decrees of this sort, although sometimes described as void in New York,[8] may, nevertheless,

26. Some experts are of the opinion that even federal judges are not sufficiently trained to decide questions of patent law, and have advocated the creation of a special court of patent appeals. See Rice, *A Court of Patent Appeals* (1935) 17 J. PAT. OFF. SOC. 18. But see Harris, *Why a Single Court of Appeals is Undesirable* (1932) 14 J. PAT. OFF. SOC. 34; Lane, *Why a Single Court of Patent Appeals Is Not Necessary* (1931) 13 J. PAT. OFF. SOC. 569. The American Bar Association has disapproved such a proposal. See (1932) 18 A. B. A. J. 902.

27. For expositions of the dangers of expanding the scope of judicial review, see Frankfurter, *A Note On Advisory Opinions* (1924) 37 HARV. L. REV. 1002; Frankfurter, *The Business Of The Supreme Court At October Term, 1934* (1935) 49 HARV. L. REV. 68, 90 et seq. The principle inherent in the instant case should not arouse such fears, since it will not enlarge federal jurisdiction in constitutional cases, a type of litigation in which the plaintiff may always invoke federal jurisdiction by asserting a right conferred on him by the Constitution.

1. Shannon v. Shannon, 286 N. Y. Supp. 27 (App. Div. 2d Dep't 1936).

2. See Goodrich, *Matrimonial Domicile* (1917) 27 YALE L. J. 49.

3. Atherton v. Atherton, 181 U. S. 155 (1901).

4. Cheever v. Wilson, 9 Wall. 108 (U. S. 1869).

5. Haddock v. Haddock, 201 U. S. 562 (1906).

6. Andrews v. Andrews, 188 U. S. 14 (1903); 1 BEALE, CONFLICT OF LAWS (1935) § 111.2; RESTATEMENT, CONFLICT OF LAWS (1934) § 111.

7. When recognition is merely a matter of comity, it is legally immaterial whether the foreign jurisdiction is one of the United States or a foreign State. Cf. Alzmann v. Maher, 231 App. Div. 139, 246 N. Y. Supp. 60 (2d Dep't 1930) (test of validity of decrees issued in sister states applied to Mexican decree).

8. See Olmsted v. Olmsted, 190 N. Y. 458, 466, 83 N. E. 569, 571 (1908). But cf. Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923). New York, accordingly, has refused

be quite effective in that state because of their immunity under certain circumstances from collateral attack.[9] When the respondent to a "void" foreign suit has not been personally served and has not appeared, and at the time of the entry of the foreign decree was a resident of New York,[10] he may attack the decree in New York;[11] if the respondent was a resident of a state other than New York, he may attack the decree in New York only if he would be permitted to do so according to the conflicts rule of such third state;[12] in either case the respondent may not attack the decree in New York if he has indicated his recognition of it by remarrying.[13]

But a party who has entered an appearance in the foreign suit has apparently not hitherto been able to question the decree in New York[14] without a showing that his submission to the foreign jurisdiction was induced by fraud.[15] Several doctrines have been used to support this result. It is frequently said that a person who has invoked the jurisdiction of a foreign court may not thereafter be heard to deny that jurisdiction in order to gain a benefit. Pursuant to this principle, a libellant who had secured a void foreign decree could not thereafter obtain support and separation from the spouse against whom the void decree had been granted.[16] Nor could a libellant in such a position deny the jurisdiction of a foreign court in order to claim dower.[17] Conversely, when a spouse who had procured such a decree

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a marriage license to a person who based his competency to marry on a "void" foreign decree. Alzmann v. Maher, 231 App. Div. 139, 246 N. Y. Supp. 60 (2d Dep't 1930). And any person who does marry on the basis of such a decree would appear to be criminally liable for bigamy or adultery, although prosecutions of this sort are rare. People v. Baker, 76 N. Y. 78 (1879); see MILLER, CRIMINAL LAW (1934) 423, 426, 428; Harper, *The Myth of the Void Divorce* (1935) 2 L. & C. PROB. 335, 340, n. 31. One spouse may enjoin another from securing such a decree. Greenberg v. Greenberg, 218 App. Div. 104, 218 N. Y. Supp. 87 (1st Dep't 1926); Prevost v. Prevost, N. Y. L. J., May 16, 1936, at 2519, col. 7 (Sup. Ct.).

9. See generally Bingham, *The American Law Institute vs. The Supreme Court* (1936) 21 CORN. L. Q. 393, 394, n. 2; Greene, *The Enforcement of a Foreign Divorce Decree in New York* (1926) 11 id. 141; Harper, *supra* note 8; Harper, *The Validity of Void Divorces* (1930) 79 U. PA. L. REV. 158; Jacobs, *Attack on Decrees of Divorce* (1936) 34 MICH. L. REV. 749; Comment (1935) 44 YALE L. J. 488.

10. See Matter of Swales, 60 App. Div. 599, 601, 70 N. Y. Supp. 220, 221 (4th Dep't 1901); Powell v. Powell, 211 App. Div. 750, 756, 208 N. Y. Supp. 153, 158 (1st Dep't 1925).

11. Baumann v. Baumann, 132 Misc. 217, 228 N. Y. Supp. 539 (Sup. Ct. 1928), aff'd, 224 App. Div. 719, 229 N. Y. Supp. 833 (1st Dep't 1928), aff'd in part, 250 N. Y. 382, 165 N. E. 819 (1929), rehearing denied, 250 N. Y. 612, 166 N. E. 344 (1929) (declaratory judgment that Mexican decree was void).

12. Dean v. Dean, 241 N. Y. 240, 149 N. E. 844 (1925), aff'g 213 App. Div. 360, 210 N. Y. Supp. 695 (4th Dep't 1925).

13. Kelsey v. Kelsey, 204 App. Div. 116, 197 N. Y. Supp. 371 (4th Dep't 1922), aff'd, 237 N. Y. 520, 143 N. E. 726 (1923); cf. Weber v. Weber, 135 Misc. 717, 238 N. Y. Supp. 333 (Sup. Ct. 1929).

14. RESTATEMENT, CONFLICT OF LAWS, N. Y. ANNOT. (1935) § 112.

15. Greenbaum v. Greenbaum, 147 Misc. 411, 263 N. Y. Supp. 774 (Sup. Ct. 1933), aff'd, 239 App. Div. 822, 264 N. Y. Supp. 933, 239 App. Div. 912, 265 N. Y. Supp. 947 (1st Dep't 1933).

16. Nathan v. Nathan, 150 Misc. 895, 270 N. Y. Supp. 551 (Sup. Ct. 1933).

17. Starbuck v. Starbuck, 173 N. Y. 503, 66 N. E. 193 (1903); Bell v. Little, 204 App. Div. 235, 197 N. Y. Supp. 674 (4th Dep't 1922), aff'd, 237 N. Y. 519, 143 N. E. 726 (1923); Matter of Swales, 60 App. Div. 599, 70 N. Y. Supp. 220 (4th Dep't 1901) (intestate succession). While a surviving spouse may elect to take a statutory share rather

remarried, he could not be heard to impeach the validity of his prior decree in order to escape the duties otherwise owed to his second spouse.[18] The principle on which these cases were based is not strictly one of estoppel, since the element of reliance is absent;[19] but when a third person has relied upon the decree, as by marrying a party to the void foreign suit, either party who has appeared in the foreign suit is estopped from questioning the decree.[20] In connection with the use of estoppel, moreover, there has been an indication that laches will weaken the privilege of either spouse who has entered an appearance in the foreign suit collaterally to attack the foreign decree.[21] And, in addition, a theory in the nature of res adjudicata has been used to preclude either party who has entered an appearance in the foreign suit from questioning the adjudication thereby invited.[22]

In a recent case, however, apparently for the first time in New York, none of

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than dower, N. Y. DECEDENT ESTATE LAW (1930) § 82, the principal enunciated in the cases *supra* would seem applicable as well to prevent a spouse from denying the validity of a foreign divorce obtained at his instance or with his consent in order to claim a statutory share. N. Y. DECEDENT ESTATE LAW (1934) § 87 was apparently designed for the express purpose of cutting off the statutory share of a spouse who has obtained a void foreign divorce. See 13 MCKINNEY, CONSOLIDATED LAWS OF NEW YORK, ANNOTATED (Supp. 1935) § 87, note of Commission. Children of the first marriage may impeach the void foreign decree even where decedent could not have done so. In re Thomann's Estate, 144 Misc. 497, 258 N. Y. Supp. 838 (Surr. Ct. 1932).

18. Brown v. Brown, 242 App. Div. 33, 272 N. Y. Supp. 877 (4th Dep't 1934), aff'd, 266 N. Y. 532, 195 N. E. 186 (1935) (husband liable for support of second wife); cf. Van Dover v. Van Dover, 286 N. Y. Supp. 328 (2d Dep't 1936) (husband denied annulment of marriage contracted subsequent to void divorce from first wife and ordered to pay alimony *pendente lite* to second wife; decided after principal case). But he could not complain of the consequent evasion of the duties owed him by the second spouse. Fischer v. Fischer, 254 N. Y. 463, 173 N. E. 680 (1930); Lefferts v. Lefferts, 238 App. Div. 37, 262 N. Y. Supp. 671 (1st Dep't 1933); cf. Hinderman v. Hinderman, 245 App. Div. 246, 280 N. Y. Supp. 449 (2d Dep't 1935). A second husband, however, was not permitted to question a foreign decree after he had induced his wife to procure the decree and had supplied her with money to pay her expenses incurred in traveling to and from the foreign jurisdiction and her maintenance during the period of foreign residence. Kaufman v. Kaufman, 160 N. Y. Supp. 19 (Sup. Ct. 1916), aff'd, 177 App. Div. 162, 163 N. Y. Supp. 566 (1st Dep't 1917).

19. See In re Feyh's Estate, 52 Hun 102, 108, 5 N. Y. Supp. 90, 93 (1st Dep't 1889).

20. Simmonds v. Simmonds, 78 Misc. 571, 138 N. Y. Supp. 639 (Sup. Ct. 1912); see Starbuck v. Starbuck, 173 N. Y. 503, 509, 66 N. E. 193, 194 (1903); Schneider v. Schneider, 232 App. Div. 71, 73, 249 N. Y. Supp. 131, 133 (2d Dep't 1931); Harper, *supra* note 8, at 339.

21. See Schneider v. Schneider, 232 App. Div. 71, 73, 249 N. Y. Supp. 131, 133 (2d Dep't 1931); cf. Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082 (1904).

22. Jones v. Jones, 108 N. Y. 415, 15 N. E. 707 (1888); In re Pratt's Estate, 233 App. Div. 200, 251 N. Y. Supp. 424 (4th Dep't 1931); see Schneider v. Schneider, 232 App. Div. 71, 73, 249 N. Y. Supp. 131, 133 (2d Dep't 1931); cf. Hinderman v. Hinderman, 245 App. Div. 246, 280 N. Y. Supp. 449 (2d Dep't 1935); Chapman v. Chapman, 224 Mass. 427, 113 N. E. 359 (1916); see Harper, *supra* note 8, at 340.

In some jurisdictions, a void foreign divorce suit in which both spouses have entered appearances may be effective to determine the rights of the parties *inter se* on a theory of contract, each party agreeing to release the other from duties owed. Cf. Chapman v. Chapman, 224 Mass. 427, 113 N. E. 359 (1916); see Harper, *supra* note 9, 79 U. OF PA. L. REV. at 173, 174.

these related equitable principles availed to prevent a successful collateral attack on a "void" foreign decree by a party who had knowingly entered an appearance in the foreign court. The parties to this suit were a husband and wife, residents of New York, who in 1932 obtained a decree of divorce from a Mexican court by mutual consent, appearing through attorneys.[23] Immediately after the decree was granted, the wife contracted a second marriage in Connecticut and took up residence with her new husband in Canada. More than two years later, the *first* husband petitioned the New York Supreme Court for a decree of divorce from the wife, alleging that the mail-order Mexican divorce was void for want of jurisdiction, so that his wife was living in adultery with her supposed second husband. The trial court denied the petition, holding that, although the Mexican divorce was void, the husband could not be heard to impeach the validity of the decree of a court to whose jurisdiction he had submitted, especially since the wife had entered into a second marriage in reliance upon his Mexican appearance. The Appellate Division, however, held, with two justices dissenting, that the position of the husband in the New York court was not inconsistent with his position in the Mexican court and that he was not seeking anything to the disadvantage of the wife or her estate; and a decree of divorce was granted.[1]

Since it was undisputed that the Mexican consent decree was void, as the word is understood in New York, the question of the case was simply the privilege of the husband to impugn its validity.[24] A theory of estoppel might have been used to deny the husband's petition on the ground that the second husband had contracted marriage with the wife in reliance upon the color of validity lent to the Mexican suit by the consent and appearance of the husband.[20] Or it might have been held that the first husband, in submitting his marital dispute to an adjudication by a Mexican court, had perpetrated a fraud upon the courts of his matrimonial domicil and by his own wrongdoing had aided in the creation of the situation of which he complained, so that a court of equity ought not to grant relief.[25] His position in the New York court, further, would appear to be clearly inconsistent with his position in the Mexican suit, for he could not assert the adultery without first denying the validity of the Mexican decree. But, on the other hand, he could hardly have been precluded from questioning the Mexican decree on the ground that he was endeavoring to make his own position secure and otherwise to obtain a benefit for himself at the expense of the wife; for her appearance in the Mexican court would alone have prevented her claiming any property rights in New York under her first marriage,[26] although the New York decree might cut off property rights which would have survived the Mexican decree in other states.[27] And, although the New York divorce

23. For discussions of the divorce laws of Mexico and their use by citizens of the United States, see Bates, *The Divorce of Americans in Mexico* (1929) 15 A. B. A. J. 709; Summers, *The Divorce Laws of Mexico* (1935) 2 L. & C. PROB. 310.

24. The fact that the foreign divorce in the principal case was procured in Mexico rather than in one of the United States does not particularize the principal case or render less applicable the rules governing persons who may attack void foreign divorce decrees. Cf. Weber v. Weber, 135 Misc. 717, 238 N. Y. Supp. 333 (Sup. Ct. 1929); Van Dover v. Van Dover, 286 N. Y. Supp. 328 (2d Dep't 1936) (decided after principal case).

25. Cf. Borenstein v. Borenstein, 151 Misc. 160, 270 N. Y. Supp. 688 (Sup. Ct. 1934), aff'd, 242 App. Div. 761, 274 N. Y. Supp. 1011 (1st Dep't 1934), motion to dismiss appeal denied, 267 N. Y. 547, 196 N. E. 572 (1935); Greenberg v. Greenberg, 218 App. Div. 104, 115, 218 N. Y. Supp. 87, 97 (1st Dep't 1926).

26. See notes 16, 17, *supra*.

27. It is true that the decree may affect her rights against the property of the first

does unsettle the status of the wife's second marriage, the practical consequences of the decree may be salutary: The wife is made competent to contract a new, clearly valid marriage with her second husband[28] in any state which will recognize the New York decree—a marriage which in many jurisdictions, moreover, will legitimatize retroactively any children who might otherwise have been considered the illegitimate offspring of the marriage celebrated solely on the strength of the "void" Mexican decree;[29] while at the same time the first husband may now remarry in New York without committing bigamy or adultery and without the possibility that a future wife will raise the "void" Mexican decree to his detriment.[30]

EXCLUSION OF NEGROES FROM STATE SUPPORTED PROFESSIONAL SCHOOLS[1]

A NEGRO citizen of Maryland, admittedly qualified, was refused admission to the Law School of the University of Maryland, the only publicly supported law school in the state, on the sole ground of his color. While there was no legislation expressly excluding Negroes from the University, the state's policy of continuing educational segregation of white and colored students[2] into the graduate and professional levels was evidenced by an act of 1935 which created a Commission on Higher Education of Negroes and directed it to disburse $10,000 annually in the form of tuition scholarships, limited to $200 each, to afford Negroes an opportunity for study outside the state.[3] Holding that this provision did not afford petitioner the equal protection

husband in jurisdictions which, unlike New York, do not preclude a party who has entered an appearance in the foreign court from questioning the validity of the foreign divorce decree; for these states must now give full faith and credit to the New York divorce. But such possible alteration of her property rights would hardly be inequitable, in view of the fact that she had already treated the Mexican decree as valid by attempting to contract a second marriage on the strength of it.

28. While a person divorced for adultery in New York may not, as a general rule, immediately contract another marriage in New York, N. Y. DOMESTIC RELATIONS LAW (1915) § 8, such prohibition is purely penal and does not operate against the validity of a marriage contracted without the state. In re Eichler, 84 Misc. 667, 146 N. Y. Supp. 846 (Surr. Ct. 1914); see GOODRICH, CONFLICT OF LAWS (1927) 260, 261.

29. At common law, the children of all void marriages are illegitimate. In most states, however, this rule has been altered by legislation. 4 VERNIER, AMERICAN FAMILY LAWS (1936) § 247; 1 id. (1931) § 48.

30. Fischer v. Fischer, 254 N. Y. 463, 173 N. E. 680 (1930); Lefferts v. Lefferts, 238 App. Div. 37, 262 N. Y. Supp. 671 (1st Dep't 1933); Hinderman v. Hinderman, 245 App. Div. 246, 280 N. Y. Supp. 449 (2d Dep't 1935), all *supra* note 18.

1. Pearson v. Murray, 182 Atl. 590 (Md. 1936).

2. MD. ANN. CODE (Bagby, 1924) art. 77, § 114 (public schools for whites 6 to 21); id. art. 77, § 200 (public schools for Negroes 6 to 20); id. art. 77, § 211 (industrial schools for Negroes); id. art. 77, § 256 (normal school for Negroes).

3. Md. Laws 1935, c. 577. The statute appropriated $10,000 annually for 1936 and 1937. Although it was originally intended that the act should apply only to professional students, it was later decided to divide the stipends equally between graduates and undergraduates. Brief for Appellants 7, Pearson v. Murray, 182 Atl. 590 (Md. 1936). The act is indirectly traceable to the FEDERAL LAND GRANT ACT, 12 STAT. 503 (1862), 7 U. S. C. A. § 301 (1926), which was amended, 26 STAT. 417 (1890), 7 U. S. C. A. § 323 (1926), to require the division of the benefits under the Act among both races. Maryland ignored the requirement until 1933, when it passed an act providing for a pro rata distribution of the federal

guaranteed by the Fourteenth Amendment, the Maryland Court of Appeals affirmed an order of mandamus directing the Board of Regents of the University to admit him as a student.[1]

While different races may not be separately taxed for their respective educational facilities,[4] it is now settled that segregation in public schools on the basis of color is constitutional so long as it is based upon legislative authority[5] and offers substantially equal advantages to both groups.[6] Separate school systems have been uni-

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funds between both races; the percentage of the funds allotted to Negroes was to be expended on the Princess Anne Academy, a state junior college for Negroes, but the Board of Regents of the University of Maryland were authorized to "allocate such part of the state appropriation for Princess Anne Academy or other funds of the Academy as may by it be deemed advisable, to establish partial scholarships at Morgan College [a state-aided Negro college] or at institutions outside of the State of Maryland, for negro students who may apply for such privileges, and who may, by adequate tests, be proved worthy to take professional courses or such other work as is not offered in the said Princess Anne Academy, but which is offered for white students in the University of Maryland." MD. ANN. CODE (Flack, Supp. 1935) art. 77, § 214A. No allocations, however, were ever made under this act. Brief for Appellants 41, Pearson v. Murray, 182 Atl. 590 (Md. 1936).

4. Claybrook v. City of Owensboro, 16 Fed. 297 (D. Ky. 1883); Davenport v. Cloverport, 72 Fed. 689 (D. Ky. 1896); Puitt v. Comm'rs of Gaston County, 94 N. C. 709 (1885); Riggsbee v. Durham, 94 N. C. 800 (1886); cf. Trustees of Graded Free Colored Common Schools v. Trustees of Graded Free White Common Schools, 180 Ky. 574, 203 S. W. 520 (1918); McFarland v. Goins, 96 Miss. 67, 50 So. 493 (1909); Williams v. Board of Education of Fairfax Dist., 45 W. Va. 199, 31 S. E. 985 (1898). But cf. Crosby v. Mayfield, 133 Ky. 215, 117 S. W. 316 (1909); Chrisman v. City of Brookhaven, 70 Miss. 477, 12 So. 458 (1892); State ex rel. Clark v. Md. Institute for Promotion of Mechanic Arts, 87 Md. 643, 41 Atl. 126 (1898) (admission refused to Negro who was awarded scholarship pursuant to contract between private institution and city whereby city paid institution $9000 annually for 33 scholarships; institution also received $3000 annual appropriation from state).

5. Where local authorities establish a separate school system in the absence of legislative expression, mandamus will lie ordering the admission of Negro children into the white schools. Wysinger v. Crookshank, 82 Cal. 588, 23 Pac. 54 (1890); People ex rel. Bibb v. Mayor and Common Council of Alton, 209 Ill. 461, 70 N. E. 640 (1904); Clark v. Board of Directors, 24 Iowa 266 (1868); Board of Education of City of Ottawa v. Tinnon, 26 Kan. 1 (1881); Cartwright v. Board of Education of City of Coffeyville, 73 Kan. 32, 84 Pac. 382 (1906); People ex rel. Workman v. Board of Education of Detroit, 18 Mich. 400 (1869); Crawford v. Dist. School Board, 68 Ore. 388, 137 Pac. 217 (1913); cf. Chase v. Stephenson, 71 Ill. 383 (1874). *Contra:* Roberts v. City of Boston, 59 Mass. 198 (1849) (before Fourteenth Amendment); see Maddox v. Neal, 45 Ark. 121, 125 (1885).

6. Gong Lum v. Rice, 275 U. S. 78 (1927). Difficulties as to the proper remedy, however, have sometimes impeded the alleviation of unequal conditions. The language of the *Gong Lum* opinion, *supra,* at 84, would seem to indicate that Negroes may attend the white school when no separate school has been provided, although segregation is mandatory by state law. See also Ward v. Flood, 48 Cal. 36, 57 (1874). *Contra:* Black v. Lenderman, 156 Ark. 476, 246 S. W. 876 (1923); Martin v. Board of Education, 42 W. Va. 514, 26 S. E. 348 (1896). The *Black* opinion, *supra,* at 478, 246 S. W. at 877, implied that the proper action in such a case was a mandamus to compel the erection of a separate school, as did the Supreme Court in Cummings v. Board of Education of Richmond County, 175 U. S. 528, 545 (1899) (action to close white high school held improper remedy). But this remedy was said to be unavailable in the instant case, Pearson v. Murray, 182 Atl. 590, 594 (Md. 1936),

versally maintained in the southern and border states from elementary to normal school and collegiate levels. But the small proportion of colored aspirants to professional and graduate degrees makes independent higher institutions for Negroes impracticable.[7] Legislative provision for scholarships to schools outside the state, thus far adopted by Maryland and five other states, is apparently the only method of dealing with the problem which has yet been devised.[8] The validity of this type of statute has never before been tested.[9] The Maryland case, however, does

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because of lack of legislative authorization for a separate law school. Cf. Jones v. Board of Education of City of Muskogee, 90 Okla. 233, 217 Pac. 400 (1923) (where funds unequally distributed, proper action held one to compel levy of additional taxes rather than one to reopen colored school out of funds set apart for white schools). See Hubbard & Alexander, *Types of Potentially Favorable Court Cases Relative to the Separate School* (1935) 4 J. OF NEGRO EDUC. For a detailed discussion of the general problem of segregation, see Comment (1933) 82 U. OF PA. L. REV. 157; Symposium, *The Courts and the Negro Separate School* (1935) 4 J. OF NEGRO EDUC. 289-464.

7. None of the nineteen states practicing mandatory segregation provides separate facilities of this kind. In Kansas and Arizona, however, where the distinction is completely dropped above high school levels, Negroes may attend the regular state universities and colleges. (1935) 4 J. OF NEGRO EDUC. 289. There are only three private institutions offering professional training for Negroes in states where separate educational facilities are maintained. Virginia Union University at Richmond, Virginia, and the Central Law School of Simmons University, at Louisville, Kentucky, offer law courses, and there are the Meharry Medical College and the Meharry Dental College at Nashville, Tennessee. Atlanta University, in Atlanta, Georgia, and Fiske University in Nashville, Tennessee, maintain graduate schools for Negroes. In addition, Howard University in Washington, D. C., which is subsidized by the federal government, offers graduate, legal, medical, dental and pharmocological training. NEGRO YEARBOOK (Work, 8th ed. 1931-1932) 201, 236. The number of Negro students affected by the discrimination, however, is irrelevant. See McCabe v. Atchison, T. & S. F. Ry. Co., 235 U. S. 151, 160 (1914).

8. 10 Mo. STAT. ANN. (Vernon, 1932) c. 57, art. 19, § 9622; Mo. Laws 1935, p. 113, § 60 ($10,000 appropriation, maximum scholarships of $150 for graduates, $100 for undergraduates); OKLA. STAT. (Harlow, Supp. 1936) c. 34, art. 1A ($5,000 appropriation, maximum scholarships of $250 plus transportation differential); W. VA. CODE (1931) c. 18, art. 13, § 2, amended, W. Va. Acts, Extra. Sess. 1933, c. 12, art. 13, § 2 (providing difference between tuition charged residents and that charged nonresidents at W. Va. institutions). Kentucky, by act of February 15, 1936, appropriated $5,000 for maximum scholarships of $175; according to a communication from the National Association for the Advancement of Colored People to the YALE LAW JOURNAL the appropriation to the Kentucky State College for Negroes was reduced by a similar amount. For the Maryland act, see note 3, *supra*; the Virginia Act, n. 12, *infra*.

9. The case is one of a series being fought by the N. A. A. C. P. to improve the educational status of the Negro as one aspect of a broader campaign to ameliorate the general condition of the Negro through court action. See Kilpatrick, *Resort to Courts by Negroes to Improve their Schools a Conditional Alternative* (1935) 4 J. OF NEGRO EDUC. 412; Thompson, *Court Action the Only Reasonable Alternative to Remedy Immediate Abuses of the Negro Separate School* (1935) 4 id. 419; cf. Williams, *Court Action by Negroes to Improve their Schools a Doubtful Remedy* (1935) 4 id. 435. In March, 1933, a North Carolina Negro, Thomas Hocutt, similarly petitioned the City Court of Durham for a mandamus directing his admission to the University of North Carolina College of Pharmacy. The case was dismissed March 28 on the ground that his petition should have prayed for unprejudiced consideration of his application rather than admission. It apparently developed,

not settle the problem, for the scholarship provision on which the respondents relied was palpably inadequate,[10] and the court expressly refused to decide whether "with aid in any amount it is sufficient to send the negroes outside the state for like education."[11] Taking its cue from this caveat, the Virginia legislature passed a similar act at its last session providing for scholarships to the amount of the complete differential in tuition fees, living expenses, and transportation costs incurred at any local institution which rejects a qualified applicant and similar costs at "a college, university or institution, not operated as an agency or institution of the State," with equal educational facilities, "whether such facilities are located in Virginia or elsewhere."[12]

Legislation of this sort would seem to remove the financial inequality of treatment to which the Maryland court objected, but it may, nevertheless, leave the guaranty of equal protection of the law still unsatisfied.[13] The "substantially equal" facilities which have been accorded judicial sanction under systems of educational segregation have always been facilities of the same type for both races.[6] It may be questioned as a matter of constitutional principle whether a state which offers educational opportunities of a given type to one race may discharge its obligation to furnish substantially equal opportunities to the other race by providing funds, however adequate in amount, whereby similar advantages may be procured in another state.[14] Nor is the distinction between "substantially equal" domestic facilities and

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however, that he did not possess the entrance requirements and the suit was not appealed. As a result of this case an out-of-state scholarship bill was introduced in the North Carolina legislature, but, after passing the house, it met defeat in the Senate. Communications to the YALE LAW JOURNAL from the N. A. A. C. P. and from counsel for the University. A similar case, *Gaines v. Canada*, is pending against the University of Missouri Law School, and another, *Redmond v. Hyman*, was begun in the Chancery Court of Shelby County (Memphis) April 29, 1936, to compel admission of a Negro to the College of Pharmacy of the University of Tennessee. Communications to the YALE LAW JOURNAL from Special Counsel, N. A. A. C. P.; see Knoxville, Tenn., News-Sentinel, Apr. 30, 1936, at 1.

10. At the time of the trial, when twelve days still remained for the filing of applications, 380 requests had been received for blanks, 113 of which had been returned. There were sixteen applications for graduate work, only one of which was for law. Record 110 et seq., Pearson v. Murray, 182 Atl. 590 (Md. 1936). Ninety-seven scholarships were subsequently awarded before the funds were exhausted, and 187 applicants remained unprovided for. N. A. A. C. P. Press Release, Feb. 7, 1936.

11. Pearson v. Murray, 182 Atl. 590, 594 (Md. 1936).

12. Act of March 27, 1936. Communication to the YALE LAW JOURNAL from Special Counsel for the N. A. A. C. P. The act authorizes payment "to such person, or the institution attended by him, as and when needed [of] such sum, if any, as may be necessary to supplement the amount which it would cost such person to attend the said State college, university or institution, so that such person will be enabled to secure such equal educational facilities elsewhere without additional cost to such person. In determining the comparative costs of attending the said respective institutions the board shall take into consideration tuition charges, living expenses and costs of transportation."

13. The YALE LAW JOURNAL is informed by Special Counsel to the N. A. A. C. P. that a Negress has been refused admission to the Graduate School of the University of Virginia. No action, however, has been taken in that case.

14. The close proximity of a federal Indian school has been held not to relieve the local authorities of their duty to maintain separate schools for Indians or to admit them to the only school provided. Piper v. Big Pine School Dist. of Inyo County, 193 Cal. 664, 226 Pac. 926 (1924). The Maryland court in the instant case, however, disposed of

such substituted foreign facilities solely one of principle. The Negro student has no assurance that he will be permitted to matriculate at a northern institution which is substantially on a par with the public institution of his native state as readily as the no more competent white student will be admitted to the local school.[15] And, although he encounter no difficulty in securing admission, he will still be denied the advantages that may be derived from attendance at a local institution, such as the acquaintance of his future professional colleagues and, particularly in the case of the law student, the opportunities to concentrate on local law and to observe the local courts.[16] He may, furthermore, have reasons of an economic or social nature for not leaving his own state and may be deprived of the privilege available to the white student of studying in relative proximity to his home and family.[17]

Legislation of the Virginia type[12] is even more vulnerable to constitutional attack on another score. That act is not phrased in terms of Negroes, but authorizes the grant of a scholarship to any resident who, ". . . regardless of race, possessing the qualifications of health, character, ability and preparatory education customarily required . . . is . . . for any reason . . ." denied admission to any state institution of higher learning. The scholarship is to be awarded by the governing authorities of the state institution to which application for admission is made, out of the regular appropriation allotted to it. This generality of language, which was obviously intended to lend strength to the statute by avoiding any reference to race or class, injects into it what may be a fatal weakness. Since the act not only fails to establish any standard whatsoever by which applicants for admission to state institutions are to be judged, but on the contrary explicitly eliminates all reasonably relevant considerations, it would seem to be clearly invalid on the ground that it clothes administrative officials of the state with the power to determine at their whim and caprice who—of whatever race—shall and who shall not be given the opportunity of studying at the state universities and colleges.[18]

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respondents' argument that the Law School of Howard University, which is federally supported, was available to the petitioner simply on the ground of financial inadequacy See Pearson v. Murray, 182 Atl. 590, 593 (Md. 1936).

15. In Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N. W. 589 (1909), the defendant, a private institution, dismissed two Negro students already enrolled because of their color. While it was held that such an action violated implied contractual rights which attached to their admission, a mandamus to compel their readmission was denied because of the private character of the school. The case, however, is indicative of the hardships which may arise.

16. See Pearson v. Murray, 182 Atl. 590, 593 (Md. 1936).

17. It is no violation of the Fourteenth Amendment that colored schools are more remote than white. Dameron v. Bayless, 14 Ariz. 180, 126 Pac. 273 (1912); Lehew v. Brummel, 103 Mo. 546, 15 S. W. 765 (1891); see People ex rel. King v. Gallagher, 93 N. Y. 438, 451 (1883); cf. United States v. Buntin, 10 Fed. 730 (C. C. S. D. Ohio 1882) (question of remoteness submitted to jury, which disagreed). But cf. Williams v. Board of Education of City of Parsons, 79 Kan. 202, 99 Pac. 216 (1908) (colored school may not be dangerously located). It would seem to follow that the Negro professional or graduate student could not object to having to attend a Negro state university, if there were one, in another part of the state, although he lived in the city in which the state university for whites was located, as the petitioner did in the instant case. It may be questioned, however, whether the same principle is applicable in the absence of a Negro university, in which case *every* Negro student must leave the state if Negroes are excluded from the state institution.

18. Yick Wo v. Hopkins, 118 U. S. 356 (1886); Thompson v. Smith, 155 Va. 367, 154 S. E. 579 (1930).

Fundamentally, however, the problem remains a social one, which is particularly difficult of ultimate solution solely by judicial action.[19] The alternatives are limited. While separate institutions offering professional and graduate training to colored students would probably be held constitutional,[6] their facilities would undoubtedly be inferior even if their maintenance were financially feasible.[20] In their absence, the choice lies between the admission of Negroes to all state institutions on a basis of equality with whites and an out-of-state scholarship plan.[14] While the former may be a matter of constitutional right on the ground that provision for education of Negroes in a foreign state does not accord them "substantially equal" educational facilities, there is apparently no constitutional objection to scholarship legislation of the latter type, so long as it gives the Negro the option of accepting a foreign scholarship and does not positively exclude Negroes from the state institutions.[21]

State Reimbursement for Prisoners' Maintenance

A recent Michigan statute[1] provides that, if a prisoner in a state penal institution shall be found after due notice and judicial hearing to have an estate "which ought to be subjected to the claim of the state, . . . regard being had to claims of persons having a moral or legal right to maintenance" therefrom, it shall be liable to the state's claim of reimbursement for his support, to the extent of the per capita cost of prisoners' maintenance in the institution of which he is an inmate. Proceedings may be begun by the auditor general at any time after the prisoner's admittance to recover for "expenses paid and to be paid" during the entire period of his incarceration, and the state's claim under the statute is chargeable against all his property, both real and personal, whether acquired before or after admission.[2]

Efforts to reduce the net cost to the state of prison maintenance have generally been directed in the past toward exploiting the labor of the prisoners rather than

19. "This prejudice, if it exists, is not created by law, and probably cannot be changed by law." See Shaw, C. J., in Roberts v. City of Boston, 59 Mass. 198, 209 (1849); State ex rel. Weaver v. Board of Trustees of Ohio State Univ., 126 Ohio St. 290, 293, 185 N. E. 196, 199 (1933). But cf. Jones v. Newlon, 81 Colo. 25, 253 Pac. 386 (1927) (two judges dissenting); see Board of Education v. Tinnon, 26 Kan. 1, 19 (1881).

20. In actual operation the system of educational segregation rarely accords Negroes equal treatment. For statistical surveys see Thompson, *Education of the Negro in the United States* (1935) 42 Sch. & Soc. 625; Negro Yearbook (Work, 8th ed. 1931-1932) 203 et seq.; Harris and Spero, *Negro Problem* (1933) 11 Encyc. Soc. Sciences 335, 352.

21. The Virginia Constitution provides that white and colored "children" are not to be taught in the same schools. Art. IX, § 140. The statute which provides for the establishment of separate schools changes the word "children" to "persons." Va. Code (Michie, 1930) § 680.

1. Prison Reimbursement Act, Mich. Pub. Acts 1935, no. 253, p. 434.

2. Payment may be enforced by court order upon a guardian appointed by the court, or by an action in the name of the state. Id. § 4. Property acquired after the prisoner's release is not chargeable. The act is not clear, however, whether the state may collect in advance for expenses to be incurred during the entire period of imprisonment, or whether such costs become a lien to be collected after they accrue. Ibid. If the former view were adopted, and the expenses failed to materialize by reason of death, parole, pardon, or reduction of per capita cost, the prisoner or his estate could probably secure proportionate refund.

directly charging their estates.[3] After a brief success early in the nineteenth century, the practice of supporting prisons out of the proceeds of prison labor suffered eclipse,[4] until the present century, when prison manufacturing again became profitable in a few states and reduced maintenance costs in others.[5] But while several systems of prison labor have been tried with varying success,[6] some of the most profitable, such as the plan of hiring out prisoners to contractors, have drawn the most intense criticism, both from criminologists, who object that they prevent a social reorientation of criminals, and from business men and labor leaders, who complain of their competitive influence upon the prices of goods and the wages of free labor. The objection of business and labor has recently been embodied in the Hawes-Cooper Act, which gives the states Congressional permission to exclude prison-made goods by statute and has already resulted in a great restriction of their market.[7] Efforts to meet these obstacles, and yet to decrease net prison maintenance costs, are currently being directed toward developing a system of "states' use," whereby the products of prison indus-

3. A few states a century ago tried a system of individual accounting with each prisoner, charging him with maintenance costs and crediting his account with the proceeds of his labor, any adverse balance remaining a charge upon his property after his release. That system, however, accumulated little but bad debts, possibly by reason of the limited effectiveness of prison labor and the comparative poverty of the criminal of that day. See LEWIS, DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS (1922) 31; Weyand, *Wage Payment* (1927) 18 J. CRIM. L. 277, 278; 2 BARNES, REPORT OF THE PRISON INQUIRY COMMISSION (N. J. 1917) 63, 390-391. Cf. Washburn v. Belknap, 3 Conn. 502 (1821).

4. See GILLIN, CRIMINOLOGY AND PENOLOGY (rev. ed. 1935) 277, 310; BARNES, EVOLUTION OF PENOLOGY IN PENNSYLVANIA (1927) 166, 169, 244; HAYNES, CRIMINOLOGY (1935) 359-361.

5. See HAYNES, CRIMINOLOGY (1935) 282, 364, 372-377; GILLIN, op. cit. *supra* note 4, at 335.

6. There have been developed six principal systems of prison employment: contract (contractor furnishes machines and materials, supervises work); lease (prisoners put under control of lessee); piece-price (contractor pays set amount per article, but state controls work); state-use (products used only by institutions of state or its political subdivisions); public works and ways (public construction and repair, chiefly on roads at present); public or state account (prison used as state factory, products sold on open market). For tables of comparative use and productivity, see HAYNES, CRIMINOLOGY (1935) 361-367, 371-372, 381-382; SUTHERLAND, PRINCIPLES OF CRIMINOLOGY (1934) 430-443; GILLIN, op. cit. *supra* note 4, at 311-317, 324. With respect to foreign countries, see id. at 316-318. The Soviet system of prison administration seems unique in one respect, possibly as a result of her economic position, in that her prisons form an integral part of her industrial system, each having a production quota like any other factory. See id. at 333; CALLCOTT, RUSSIAN JUSTICE (1935) 166-167.

7. 45 STAT. 1084 (1929), 49 U. S. C. A. § 60 (1935) (effective 1934). The constitutionality of both the federal enabling act and an Ohio statute prohibiting sale of prison-made goods on the open market has been upheld. Whitfield v. Ohio, 56 Sup. Ct. 532 (1936). By 1933 fifteen states had taken advantage of the federal act to introduce some form of restriction on the sale of prison-made products. HAYNES, CRIMINOLOGY (1935) 385; see, e. g., Mich. Pub. Acts 1935, no. 210, p. 336, § 5. The ruinous effect of such state legislation on prison industries dependent upon the interstate market has provoked direct state opposition. Alabama v. Arizona, 291 U. S. 286 (1934) (application to file bill to set aside such statutes of several states denied for multifariousness and want of equity). The federal statute, however, will probably encourage the state-use system of prison labor. See GILLIN, op. cit. *supra* note 4, at 325-326; HAYNES, CRIMINOLOGY (1935) 383-385.

tries will be sold only to state institutions and departments, with a view toward specialization and an interstate exchange of surpluses.[8]

The value of the novel Michigan reimbursement legislation depends upon its effective administration as a secondary and supplementary part of an integrated system of prison maintenance based upon the development of prison industries. Thus, Michigan has recently provided for prison production and sale under a "states' use" system supplemented by the employment of prisoners on public works and ways;[9] and, since a fairly constant market has been provided for the products of prison industry through the statutory requirement that supplies for all state institutions, departments, and offices must be purchased from the prison commission insofar as local prison labor can produce them,[10] profitability should be chiefly a matter of management. Furthermore, the commission is empowered to adopt, as an effective management device, "a schedule of payments or allowances to prisoners or to their dependents . . . made on the basis of need or of motivation of or reward for industry or behavior."[11] While a system of wages directly referable to individual effort might be more desirable in some respects,[12] the Michigan provision for payment to prisoners, if properly administered, should meet the essential requirements of affording support for dependents[13] and of stimulating prison morale. Moreover, profits

8. The "states' use" system is simply an expanded state-use plan, permitting the greater economies of large-scale production through the interstate exchange of surpluses. See SUTHERLAND, op. cit. *supra* note 6, at 433; GILLIN, op. cit. *supra* note 4, at 324; HAYNES, CRIMINOLOGY (1935) 364; Whitin, *Self-Supporting Prisons* (1924) 15 J. CRIM. L. 323, 325.

9. Mich. Pub. Acts 1935, no. 210, p. 335, §§ 1, 5, 8 (b), 19; MICH. COMP. LAWS (1929) §§ 17,574, 17,637, 17,638.

10. Mich. Pub. Acts 1935, no. 210, p. 335, §§ 7, 19. Compulsory purchase statutes are often evaded, however, partly by reason of the generally inferior quality of prison products and partly through pressure of competing producers. See note 20, *infra*.

11. Mich. Pub. Acts 1935, no. 210, p. 335, § 11. There is no indication either in this act or in the reimbursement statute, Mich. Pub. Acts 1935, no. 253, p. 434, whether such payments to prisoners are subject to the state's claim for reimbursement.

12. Payment of regular wages is said to furnish greater incentive for work and rehabilitation, to promote discipline and industrial efficiency, to provide more certain means of caring for dependents and thus to increase a prisoner's self-respect, and to eliminate much of the unfairness of prison labor competition. See GILLIN, op. cit. *supra* note 4, at 334-337; SUTHERLAND, op. cit. *supra* note 6, at 445-449; HAYNES, CRIMINOLOGY (1935) 373-376. Approximately half of the state and federal prisons have paid some form of compensation, the rates ranging generally from 2¢ to 20¢ per day, with a few much higher. Id. at 374, 382. With the best system of prison road-work in the country, California has paid $2.10 per day, of which about 75¢ is the net wage. Id. at 283, 374-375.

Wage payment to prisoners seems to have originated in Europe where that part of the produce of their labor in excess of the costs of their maintenance, called the *pecule* or "overstint," was thought to belong to the prisoners. The practice has been handicapped in America by the belief that the criminal owes all his labor to society to indemnify it for the expenses of his detention. See GILLIN, op. cit. *supra* note 4, at 331-334; BEST, CRIME AND THE CRIMINAL LAW IN THE UNITED STATES (1930) 490 et seq. It has been urged, however, "that the state, as a matter of common justice, ought to pay the prisoner at least that portion of his earnings which exceeds the cost of his maintenance." See STUTSMAN, CURING THE CRIMINAL (1926) 133 et seq.

13. In 1929 thirty-four states had provided a "mother's pension" for the prisoner's family, not necessarily referable to his prison earnings. GILLIN, op. cit. *supra* note 4, at 330. It has been contended that this plan is preferable to allowance for dependents as part of

from the sale of prison-made goods should be reflected in a lower per capita cost of prison maintenance,[14] and therefore inure ultimately to the prisoner's benefit through the reduced liability of his estate under the reimbursement statute. On the whole, although the entire plan may be said to be designed primarily to afford the state complete reimbursement for the costs of maintaining prisoners,[15] it should at the same time place no undue burden on the estates of prisoners, if efficient, non-political administration can be secured.[16]

The new reimbursement statute would represent a distinct retrogression in prison policy, however, if the possibility of resorting to the separate property of prisoners should cause the state to neglect prison industries, since the resultant idleness of the prisoners would undermine the entire structure upon which a modern prison system is founded.[17] Furthermore, although prison industry has not as yet been sufficiently lucrative to make many prisons self-supporting in actual practice,[18] a few states have demonstrated that a well-organized prison with an efficient industrial program can pay its own expenses.[5] It may, therefore, be questioned whether the state is justified in shifting to the prisoner by a reimbursement statute the onus properly resting upon itself for the failure of its prison industries,[19] particularly in view of

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the prisoner's compensation, since a great deal of supervision and personal service is required for these families which the prison authorities cannot furnish. See SUTHERLAND, op. cit. *supra* note 6, at 448. The Michigan plan, however, might be cheaper for the state, since allowances for dependents will probably be considered part of the per capita cost of maintenance to be recovered out of prisoners' estates.

14. A separate accounting system is maintained by each institution. Mich. Pub. Acts 1935, no. 210, p. 335, § 10 (e), (f); MICH. COMP. LAWS (1929) §§ 429, 17,586-17,588.

15. Complete reimbursement is obviously impossible, since many prisoners have no estates sufficient to be charged with maintenance costs. Furthermore, administrative expense may make extended investigations to find chargeable property unprofitable, except possibly in the case of the long-term prisoner. Although the act provides that "the costs of such investigations shall be paid from the reimbursements secured" (§ 6), the total recovery is still limited to the per capita cost (§ 4), so that the net reimbursement may be negligible if the property is not easily found.

16. One of the most critical weaknesses in prison industry in general has been the inefficiency of its management, largely the result of political appointments. See HAYNES, CRIMINOLOGY (1935) 285, 368.

17. The problem of idleness seems one of increasing difficulty. A survey by the United States Bureau of Labor Statistics of 12 federal and 116 state prisons showed only 52% of the total prisoners productively employed in 1932, whereas there were 61% in 1923, 72% in 1895, and 75% in 1885. Of the remaining 48% in 1932, 33% were engaged in various routine prison duties, while 4% were reported as sick and 11% as idle. HAYNES, CRIMINOLOGY (1935) 381. The Hawes-Cooper Act has made solution even more difficult. See note 7, *supra*. Twenty-seven states, however, have recently associated to form a compact for the purpose of reducing prison idleness and establishing fair competition between prison and free industry. N. Y. Times, May 10, 1936, § 1, at 39, col. 3.

18. That Michigan prison industries have not been overly profitable is evidenced by the 1936-37 appropriations of $2,000,000 per year for state penal institutions (Mich. Pub. Acts 1935, no. 201, p. 328), in addition to $255,000 for prison deficiencies for 1935 (id., no. 52, p. 82), and $300,000 to the State Prison Commission for prison industries (id., no. 257, p. 457). At least part of these sums, however, may have been necessitated by the recent revision of prison industries.

19. Although the Michigan system of payments to prisoners purports to be independent of any profits accruing from their labor (see note 11, *supra*), the final result, at least as

the fact that one of the major causes of the general failure to make prisons self-sufficient has been the resistance of various pressure groups to the sale of prison products in any competitive degree.[20]

On constitutional grounds the act might be challenged as a denial of equal protection of the law, by reason of its being in effect a manner of double taxation, neither equal nor uniform, since it requires the prisoner's estate to bear both the general tax for the support of all state institutions and the special assessment for his individual maintenance. The per capita amount chargeable to the prisoner for maintenance, however, is not a tax at all, but merely payment for a special, if somewhat peculiar, service which the prisoner receives, the general tax being for the benefit of the public as a whole.[21] A further objection might be encountered under the equal protection clause on the ground that the act discriminates against those prisoners who own or acquire during their imprisonment sufficient estates to be charged under its provisions; but it can hardly be considered discriminatory in a statute requiring payments to recognize a classification based upon ability to pay.[22] With respect to due process of law, there can be little procedural objection, for the act requires adequate notice and judicial hearing.[23] Substantively, there would seem to be no objection to such a statutory charge for that part of the cost of maintenance which accrues after the passage of the act and for which the state is not already reimbursed through the proceeds of the prisoner's labor. The estates of the insane have long been chargeable for the costs of their maintenance in public institutions.[24] And historically, it would seem, prisoners have little claim to public support on other than humane considerations.[25] Prospectively applied, then, the statute appears to be valid.

More serious constitutional difficulties, however, would be encountered in any

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to the non-indigent prisoner, will be quite the contrary, since recovery under the reimbursement act will probably be increased to the extent that any prison deficit will be reflected in an increased net cost of maintenance. The injustice of making wages thus dependent upon prison profits is discussed in SUTHERLAND, op. cit. *supra* note 6, at 447-448.

20. Objections to the competition of prison products, even for state use alone, are made not only by labor groups, but also by manufacturers of and dealers in the commodities produced. See HAYNES, CRIMINOLOGY (1935) 370-371, 387.

21. The same objection has been unsuccessfully raised with respect to similar statutes authorizing reimbursement for support of the insane in public institutions. Bon Homme County v. Berndt, 15 S. D. 494, 90 N. W. 147 (1902); Kaiser v. State, 80 Kan. 364, 102 Pac. 454 (1909); State Comm. in Lunacy v. Eldridge, 7 Cal. App. 298, 94 Pac. 597 (1908).

22. See Estate of Yturburra, 134 Cal. 567, 568, 569, 66 Pac. 729 (1901) (reimbursement from estate of insane person). It might be argued that, in order to avoid possible discrimination, the statutory charge should remain a debt against property acquired after the prisoner's release. Cf. Board of Administration v. Miles, 278 Ill. 174, 115 N. E. 841 (1917).

23. In the absence of provision for judicial hearing, however, objection might be based on the fact that the determination by an administrative board of the extent of exemptions for dependents and creditors is arbitrary for lack of legislative standards. Cf. Board of Administration v. Miles, 278 Ill. 174, 115 N. E. 841 (1917).

24. See State v. Ikey's Estate, 84 Vt. 363, 79 Atl. 850 (1911); Note (1926) 48 A. L. R. 733; SMOOT, LAW OF INSANITY (1929) §§ 178-185.

25. English prisons of the eighteenth century were generally operated as private businesses for profit, charging fees for particular services, often including the furnishing of food, so that support of the indigent devolved largely on friends and charities. A small county allowance, however, was usually made for convicted felons. See WEBB, ENGLISH PRISONS UNDER LOCAL GOVERNMENT (1922) 5-9, 18.

attempt to apply the statute retroactively. Although as phrased the statute exacts only a reasonable reimbursement for actual expenses incurred in the prisoner's behalf and does not impose a penalty, it might, nevertheless, be considered essentially punitive in effect, and, therefore, unconstitutional as *ex post facto* legislation with respect to claims against prisoners sentenced prior to its passage.[26] Retroactive application, moreover, would savour of forfeiture of property without due process of law,[27] at least as to expenses incurred before the passage of the act, for it is doubtful whether the act can operate to impose an obligation as to support furnished by the state without expectation of repayment.[28] The language of the statute, however, would not seem to make retroactive application mandatory,[29] and if any of its provisions should be so construed, they might be considered severable.

THE FOURTEENTH AMENDMENT AS A RESTRICTION ON NON-DISCRIMINATORY ASSESSMENTS FOR TAXATION[1]

IT HAS been a familiar maxim in constitutional attacks on state property taxes that assessments will not be overthrown by the courts for errors in judgment on the part of the assessing board, in the absence of a showing of actual fraud or "something equivalent to fraud," such as arbitrary action, intentional overassessment, or discrimination.[2] While some courts have indulged in a rebuttable presumption of construction fraud upon the mere showing that an assessment was excessively high,[3]

26. U. S. CONST. Art. I, § 10; MICH. CONST. art. II, § 9. Compare Kring v. Missouri, 107 U. S. 221 (1882), with Mahler v. Eby, 264 U. S. 32 (1924). The element of penalty would be more pronounced if prison earnings were not deducted in the calculation of the per capita maintenance cost chargeable to the prisoner's estate.

27. Cf. Nichols v. Coolidge, 274 U. S. 531, 543 (1927) (retroactive application of federal estate tax); Helvering v. Helmholz, 296 U. S. 93, 97 (1935) (same).

28. Guardians of Pontypridd Union v. Drew, [1927] 1 K. B. 214; State v. Colligan, 128 Iowa 536, 104 N. W. 905 (1905) (no implied obligation rendering estate of insane person liable in absence of statute); Audrain County v. Muir, 297 Mo. 499, 249 S. W. 383 (1923) (same).

29. Mich. Pub. Acts 1935, no. 253, p. 435, § 4. Statutes are not applied retroactively except by express command or unavoidable implication. State ex rel. Hilton v. Probate Ct., 142 Minn. 283, 171 N. W. 928 (1919); Estate of Pelishek, 216 Wis. 176, 256 N. W. 700 (1934).

1. Great No. Ry. Co. v. Weeks, 56 Sup. Ct. 426 (1936), rev'g 77 F. (2d) 405 (C. C. A. 8th, 1935) (Stone, Cardozo, and Brandeis, JJ., dissenting), noted (1936) 36 COL. L. REV. 848, (1936) 49 HARV. L. REV. 1012, (1936) 30 ILL. L. REV. 1070, (1936) 20 MINN. L. REV. 689, (1936) 84 U. OF PA. L. REV. 784.

2. See State Railroad Tax Cases, 92 U. S. 575, 610, 615 (1875); Kelly v. Pittsburgh, 104 U. S. 78, 80 (1881); Maish v. Arizona, 164 U. S. 599, 611 (1896); Baker v. Druesedow, 263 U. S. 137, 142 (1923) (distinguishing between "gross errors" and "mere errors"); Rowley v. Chicago & N. W. Ry. Co., 293 U. S. 102, 111 (1934); Powell, *Due Process Tests of State Taxation, 1922-1925* (1926) 74 U. OF PA. L. REV. 573, 583.

3. Northern Pac. Ry. Co. v. Adams County, 1 F. Supp. 163 (E. D. Wash. 1932); W. Va. Hotel Corp. v. W. C. Foster Co., 101 Fla. 1147, 132 So. 842 (1931); People v. St. Louis Electric Bridge Co., 290 Ill. 307, 125 N. E. 280 (1919); see Northern Pac. Ry. Co. v. State, 84 Wash. 510, 544, 147 Pac. 45, 56 (1915). The theory behind these cases seems to be that an excessive assessment is indicative of discrimination. See Sweet, Inc., v. City of Auburn, 180 Atl. 803, 804 (Me. 1935). But see Rowley v. Chicago & N. W. Ry. Co.,

the Supreme Court has upheld both excessive assessments[4] and exorbitant tax rates,[5] in the absence of proof of discrimination. In a recent case, however, the Supreme Court, while admitting that "overvaluation is not of itself sufficient to warrant injunction against any part of the taxes based on the challenged assessment," found the "equivalent of intention or fraudulent purpose to overvalue the property" in the failure of the assessors, who had theretofore based their assessment in part on the market value of the railroad's securities, to consider the great diminution in the value of the petitioning railroad's property caused by the depression.[1] While this ostensible reliance on the arbitrariness of the method by which the assessment was computed saves the case from being verbally inconsistent with precedent, its effect is to set aside a tax for the first time by finding in the administrative act of overassessment that arbitrariness of conduct considered to be violative of the Fourteenth Amendment.[6]

The case arose as a suit for an injunction in the federal court in which the Great Northern Railway Company challenged the North Dakota assessment valuation of its property for 1933 as arbitrary and grossly excessive, on the ground that it was substantially the same as the 1932 amount, whereas, if the same method of valuation had been adopted for 1933 as for 1932 and preceding years, the 1933 valuation would have been at least 24.52% less than the sum assessed. The assessments for a number of preceding years had been fixed, under a unit-rule fraction here upheld as valid, by averaging (a) the railway's total stock and bond prices and (b) the capitalized net income at 6%, each average being computed for the period of the preceding five years, and then by taking a mean of the first two averages;[7] but the prices of petitioner's bonds and stocks had declined considerably during the depression and its net operating income had shrunk almost to the vanishing point. With no other evidence before it as to the method of valuation for 1933, since the District Court had refused to find the value of the property in that year and the Circuit Court of Appeals had held that the railroad had failed to prove what method had been employed, the Supreme Court, nevertheless, reversed the lower court's dismissal and enjoined the collection of any tax on a valuation in excess of 87% of the actual assessment.[8]

The special difficulty with the case lies in discovering which among several possible constitutional premises the court actually used. The Court held that the North Dakota statute, requiring that taxes be levied on the "true and full value in money . . ." meant by that phrase to tax at a valuation which would be constitutionally proper as "fair present value" in a condemnation or a rate making case.[9] If the

293 U. S. 102, 111 (1934) (overvaluation as a result of erroneous judgment will not support a claim of discrimination).

4. Kelly v. Pittsburgh, 104 U. S. 78 (1881); Pittsburgh, C. C. & St. L. Ry. Co. v. Backus, 154 U. S. 421 (1894); Baker v. Druesedow, 263 U. S. 137 (1923); Rowley v. Chicago & N. W. Ry. Co., 293 U. S. 102 (1934). But see Norwood v. Baker, 172 U. S. 269, 278 (1898); Chicago & N. W. Ry. Co. v. Eveland, 13 F. (2d) 442, 448 (C. C. A. 8th, 1926), cert. dismissed, 273 U. S. 775 (1927).

5. Alaska Fish Co. v. Smith, 255 U. S. 44 (1921); see McCulloch v. Maryland, 4 Wheat. 316, 428 (U. S. 1819); Veazie Bank v. Fenno, 8 Wall. 533, 548 (U. S. 1869); Loan Ass'n v. Topeka, 20 Wall. 655, 663 (U. S. 1874); Magnano Co. v. Hamilton, 292 U. S. 40, 45 (1934), noted (1934) 22 GEO. L. J. 862.

6. See Great No. Ry. Co. v. Weeks, 56 Sup. Ct. 426, 435 (1936) (dissent).

7. See Hodes, *The Assessment of Railroads in Illinois* (1935) 29 ILL. L. REV. 744, 748; Ravage, *Valuation of Public Utilities for Ad Valorem Taxation* (1932) 41 YALE L. J. 487, 485 et seq.

8. The assessment was cut from $78,832,888 to $68,832,888.

9. N. D. COMP. LAWS ANN. (1913) § 2122, amended, id. (Supp. 1925) § 2122. The

Court meant by this construction of the North Dakota statute to imply that no other reading of it would be constitutional, it incorporates into the law of ad valorem taxation the novel rule that taxpayers have a constitutional right to be taxed at the present value of their property, and with it the constitutional principles governing rate making and condemnation. As Mr. Justice Stone indicated in dissent, however, purposes in valuing property for condemnation and rate making are quite different from those motivating valuation for taxation.[10] Due process of law in condemnation and rate making requires a sufficiently high valuation in each individual case to prevent the taking of property without adequate compensation; but no such criterion would seem properly to exist with respect to valuation for taxation purposes, for taxation is in essence a taking of property without direct compensation. In the absence of such extraordinary collateral circumstances as taxation without jurisdiction[11] retroactivity,[12] the inclusion of property not owned by the taxpayer,[13] or discrimination,[14] it is difficult to see how the constitutional guaranty against a taking of property without due process of law applies to tax valuation other than procedurally. There is no reason why valuation for tax purposes should be as exact as valuation for rate making; taxation, it is often said, is a practical matter, affecting only the size of the contribution made by the taxpayer to the costs of government. So long as the valuation is approximately correct and the same standards are applied equally to all taxpayers of the same class, it is immaterial to a taxpayer whether his increased tax bill is due to a rise in the tax rate or to a changed method of assessment valuation. Election among the various criteria which may be used to determine property values for tax purposes would, therefore, appear to be fully as much a matter for administrative discretion as the amount of the assessment,[15]

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absence of a construction of the phrase by the state court of last resort might have been an inhibition to federal jurisdiction here, as in Rowley v. Chicago & N. W. Ry. Co., 293 U. S. 102, 104 (1934); cf. Rogers v. Guaranty Trust Co., 288 U. S. 123, 132 (1933); see Frankfurter and Hart, *Business of the Supreme Court at October Term, 1934* (1935) 49 HARV. L. REV. 68, 91-93.

10. The regulation of rates is a field "limited by constitutional rights and legislative requirements." Atchison, T. & S. F. Ry. Co. v. United States, 284 U. S. 248, 262 (1932); see Northern Pac. Ry. Co. v. Adams County, 1 F. Supp. 163, 173 et seq. (E. D. Wash. 1932). The "power of taxation should not be confused with the power of eminent domain. Each is governed by its own principles." Houck v. Little River Dist., 239 U. S. 254, 264 (1915). The rate and condemnation cases are, therefore, readily distinguishable. West v. Chesapeake & Potomac Tel. Co., 295 U. S. 662 (1935) (rates); Boom Co. v. Patterson, 98 U. S. 403, 408 (1878) (condemnation). See Ravage, *supra* note 7, at 504 et seq.

11. Fargo v. Hart, 193 U. S. 490 (1904); Union Tank Line Co. v. Wright, 249 U. S. 275 (1919); Southern Ry. Co. v. Kentucky, 274 U. S. 76 (1927).

12. Nichols v. Coolidge, 274 U. S. 531 (1927); Helvering v. Helmholz, 296 U. S. 93 (1935).

13. See Heiner v. Donnan, 285 U. S. 312, 326 (1931); cf. Inhabitants of Town of Georgetown v. Reid, 132 Me. 414, 171 Atl. 907 (1934).

14. Cummings v. Nat. Bank, 101 U. S. 153 (1879); Raymond v. Chicago Union Traction Co., 207 U. S. 20 (1907); Cumberland Coal Co. v. Board of Revision of Greene County, Pa., 284 U. S. 23 (1931). Another extraordinary ground for attack is assessment for special improvement in excess of benefits received. Norwood v. Baker, 172 U. S. 269 (1898); Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 478 (1916); Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405 (1935), noted (1935) 44 YALE L. J. 1259.

15. See Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 176 (1896); Spencer v. Merchant, 125 U. S. 345, 353 (1888); Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 553 (1888); Maish v. Arizona, 164 U. S. 599, 611 (1896); Rowley v. Chicago & N. W. Ry.

provided that the assessors can be said to have arrived in good faith at an honest judgment of value and have not undertaken to raise the tax rate without consulting the legislature.

If the case thus holds that the valuation was constitutionally invalid because it was too high or because the state administrators used the wrong methods in ascertaining it, the references in the opinion to the analogy of rate making and condemnation as a guide to tax valuation seem decisive;[16] but on the other hand, if the basis for the decision is the more limited procedural one of the assessors' unreasonableness in failing to use any one among the known methods of valuing a railroad's property for taxation, the case must be classified as an instance of judicial protection against administrative conduct not defined by clear standards.[17] In this construction of the case, its unconstitutional element is not the inaccuracy of the assessors' method as a means of discovering present value of railroad property, but the absence of any evident method to guide their determination.

As a practical matter, this new constitutional weapon with which to attack state taxes means both a burdensome increase in federal litigation[18] and an erratic reduction of state revenues[19] at a time when state expenses are, if anything, greater than in a period of economic prosperity.[20] While no obstacle has yet been interposed

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Co., 293 U. S. 102, 109 (1934). But see Kelly v. Pittsburgh, 104 U. S. 78, 79, 80 (1881). Valuation of property for tax purposes has been said to be largely a matter of opinion, not amenable to exact mathematical calculation and ill-suited to conform to rigid constitutional standards. See Rowley v. Chicago & N. W. Ry. Co., 293 U. S. 102, 109 (1934), and cases there cited. But see Chicago & N. W. Ry. Co. v. Eveland, 13 F. (2d) 442, 448 (C. C. A. 8th, 1926), cert. dismissed, 273 U. S. 775 (1927); People v. Gillespie, 358 Ill. 40, 46, 192 N. E. 664, 667 (1934).

16. Valuations for rate making have been attacked both because the methods used were improper, as a matter of law [Bluefield Water Works v. Public Service Comm. of W. Va., 262 U. S. 679 (1923); St. Louis & O'Fallon Ry. Co. v. United States, 279 U. S. 461 (1929); West v. Chesapeake & Potomac Telephone Co., 295 U. S. 662 (1935)], and because the result reached did not in fact approximate the fair market value of the property [Los Angeles Gas & Electric Corp. v. Railroad Comm. of Cal., 289 U. S. 287 (1933); Clark's Ferry Bridge Co. v. Public Service Comm. of Pa., 291 U. S. 227 (1934); Dayton Power & Light Co. v. Public Utilities Comm. of Ohio, 292 U. S. 290 (1934)]. That the analogy of rate making will not be pressed to inconvenient lengths in valuation for tax purposes is evident from Great No. Ry. Co. v. Weeks, 56 Sup. Ct. 426 (1936), since the Court there used a formula of valuation which might not satisfy the tests prescribed in the *O'Fallon* case, *supra*, for valuing railroad property in rate making.

17. See, for example, West Ohio Gas Co. v. Public Utilities Comm. of Ohio (No. 2), 294 U. S. 79, 81 (1935); West Ohio Gas Co. v. Public Utilities Comm. of Ohio (No. 1), 294 U. S. 63, 67-68, 71 (1935); Willis's Ex'r v. Commonwealth, 97 Va. 667, 34 S. E. 469 (1899).

18. The effects of this increase will be aggravated by the fact that the courts will be called upon to perform the functions of state tax assessment boards. At the same time, there will be a concomitant retardation of the state tax administration, whose remedy must be exhausted first. Prentis v. Atlantic Coast Line Co., 211 U. S. 210 (1908).

19. Sloman-Polk Co. v. Detroit, 261 Mich. 689, 247 N. W. 95 (1933); see Bonbright, *The Valuation of Real Property for Tax Purposes* (1934) 34 COL. L. REV. 1397, 1410; Powell, *Developments in the Law—Taxation* (1934) 47 HARV. L. REV. 1209, 1233.

20. See Great No. Ry. Co. v. Weeks, 56 Sup. Ct. 426, 435, 436 (1936) (dissent); cf. West v. Chesapeake & Potomac Tel. Co., 295 U. S. 662 (1935) (rate valuation). The principle underlying an unlimited taxing power has always been that the very existence

on the score of the federal constitution against the state's recouping its loss in income resulting from such reduced valuation by simply raising its tax rate or by increasing the percentage of the valuation on which the tax is levied,[21] resort to this expedient may be prevented by a limitation on the tax rate in the state constitution.[22]

RIGHT OF A THIRD PARTY TO ENJOIN ENFORCEMENT OF A LABOR AGREEMENT WHICH INTERFERES WITH HIS CONTRACT[1]

A STRIKE of all the shoeworkers in Haverhill, Massachusetts, was settled through the efforts of the local Board of Trade, and the terms of the settlement were embodied in closed shop contracts, made on April 9, 1934, between the shoeworkers' union and the several shoe manufacturers. One clause of these contracts required the shoe manufacturers to use only union-made wood-heels after June 1, 1934. In direct conflict with this provision of the closed shop agreement was the six-month contract of the plaintiff, a non-union wood-heel manufacturer, for the sale of heels to a shoe manufacturer. This contract was interrupted and threatened with breach shortly before the time agreed upon for its termination. The heel manufacturer thereupon sought to enjoin the defendant union from interfering with purchases under this contract. The Supreme Judicial Court of Massachusetts concluded that the plaintiff heel manufacturer, notwithstanding his conceded remedy against the shoe manufacturer in damages for breach of contract, should be granted the protection of an injunction against any affirmative action by the union seeking to enforce its subsequent contract to the injury of the plaintiff.

The issues presented to the court by the principal case were whether, in the face of two valid but incompatible contracts, protection against threatened interference by third parties should be extended to that contract first made; and, if so, whether the protection afforded should be the legal one of damages in tort for inducement of the breach or the equitable one of an injunction.

Relief of any kind on a cause of action for inducement of breach of contract, under the rule of *Lumley v. Gye*,[2] has repeatedly been denied when the action of the third

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of government depends on the continuous availability of the entire resources of the people. See McCulloch v. Maryland, 4 Wheat. 316, 428 (U. S. 1819); Loan Ass'n v. Topeka, 20 Wall. 655, 663 (U. S. 1874); cf. Sweet, Inc., v. City of Auburn, 180 Atl. 803, 804 (Me. 1935). For a discussion of the problem of property assessment on the basis of inflated and deflated market values, see Bonbright, *supra* note 19, at 1411.

21. See Greene v. Louisville & I. Rr. Co., 244 U. S. 499, 515, 516 (1917); City of Roanoke v. Gibson, 161 Va. 342, 348, 170 S. E. 723, 725 (1933); cases cited note 5, *supra*. North Dakota had, in fact, reduced the percentage of valuation to which the rate was applied from 75% to 50%. N. Dak. Laws 1933, p. 493.

22. N. D. CONST. § 174 limits the rate to four mills on the dollar. These evils might be mitigated if the decision were confined to interstate carriers or to railroads in general. See Baker v. Druesedow, 263 U. S. 137, 140 (1923); State Railroad Tax Cases, 92 U. S. 575, 611 (1875); Southern Ry. Co. v. Watts, 260 U. S. 519, 525 (1923); 2 COOLEY, TAXATION (4th ed. 1924) § 948. But the Court expressly refused to consider "whether the assessment is repugnant to the equal protection or commerce clause." Great No. Ry. Co. v. Weeks, 56 Sup. Ct. 426, 434 (1936).

1. Service Wood Heel Co. v. Mackesy, 199 N. E. 400 (Mass. 1936); noted in (1936) 16 B. U. L. REV. 432. The Supreme Judicial Court reversed a decree dismissing the bill and granted an injunction.

2. 2 El. & Bl. 216 (Q. B. 1853).

party causing the breach has been considered to be privileged on principles either of law or of public policy. The instant decision appears to ignore this doctrine of privilege, under which recovery has been denied for injuries inflicted by the exercise of rights equal to the one injured.[3] In the principal case the rights of the union were based on a valid contract. A further element supporting a finding of privilege in this case is the fact that the agreement with the union, left unenforceable by the instant decision, terminated a long period of industrial strife and was obtained by means of collective bargaining conducted under the auspices of the local Board of Trade.[4] The interests of the public in having labor difficulties settled peacefully by means of collective bargaining,[5] and the interests of labor in effecting an amicable extension of unionization and in preserving agreements to that end from subsequent judicial interference, would seem to outweigh reasons for according equitable protection to a single short-term contract, breach of which is readily compensable in damages. Yet it may be argued that, granting the advantages of collective bargaining in general, a labor union should not be permitted to extend its sphere of influence over third parties merely by virtue of some strategic power it may have over employers. That such influence may not in Massachusetts be acquired by strike has been settled,[6] but decision had hitherto been expressly reserved on the question of whether this purpose might not be accomplished by a contract.[7] Facing a closely analogous problem, the courts of Massachusetts, although declaring it to be illegal to strike for a closed shop,[8] have long held that an agreement for a closed shop is legal and that an employee dis-

3. Mogul Steamship Co. v. McGregor Gow Co., 23 Q. B. D. 598 (C. A. 1889) (leading case). Instances of privileged injury based on the right of labor to strike and act collectively in its own interest, and on the privilege of competition between businessmen are familiar. For cases and general theory see Holmes, *Privilege, Malice, and Intent* (1894) 8 HARV. L. REV. 1; Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663, 679; Carpenter, *Interference with Contract Relations* (1928) 41 HARV. L. REV. 728, 745; Comment (1922) 32 YALE L. J. 171.

4. This in itself should be sufficient to distinguish the principal case from Stearns Lumber Co. v. Howlett, 260 Mass. 45, 157 N. E. 82 (1927), upon which the court principally relies. There a carpenters' union, by strike, contract, and intimidation, was attempting to induce contractors to cease purchasing trim from the plaintiffs, non-union employers. No unified attempt at settlement between the union and employers had been made. A further ground of distinction was that in the *Stearns* case the non-union employees of the plaintiff were doing work for which the members of the defendant union were not trained, whereas in the instant case one of the locals of the union was composed of wood-heel workers.

5. See the declaration of policy of the National Labor Relations Act, 49 STAT. 449, 29 U. S. C. A. § 151 (1935).

6. Stearns Lumber Co. v. Howlett, 260 Mass. 45, 157 N. E. 82 (1927); Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753 (1906). *Contra:* Paine Lumber Co. v. Neal, 244 U. S. 459 (1917); Gill Engraving Co. v. Doerr, 214 Fed. 111 (S. D. N. Y. 1914); Grant Construction Co. v. Building Trades Council, 136 Minn. 167, 161 N. W. 520 (1917); Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917). Cf. Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n, 274 U. S. 37 (1927).

7. "It is plain that, in the absence of an agreement entered into voluntarily by the employer with the union organization, whereby the employer agrees to buy only union-made materials, a strike because of refusal to do so is illegal." Stearns Lumber Co. v. Howlett, 260 Mass. 45, 65, 157 N. E. 82, 89 (1927).

8. Plant v. Woods, 176 Mass. 492, 57 N. E. 1011 (1900); Folsom v. Lewis, 208 Mass. 336, 94 N. E. 316 (1911); New England Wood Heel Co. v. Nolan, 268 Mass. 191, 167 N. E. 323 (1929).

placed as a result of it is not entitled to enjoin the union from inducing breach of his contract.[9]

But even if plaintiffs have a cause of action against the union for interference, under the closed shop contract, with the plaintiff's contract to sell heels, the court's decision granting equitable relief for that interference seems questionable. The court made no finding that the remedy at law was inadequate,[10] and, indeed, it is difficult to perceive how the remedy of damages for the tortious inducement could have been proven to be inadequate.[11] Moreover, it is doubtful whether the facts were appropriate for the issuance of an injunction in the instant case. It is arguable that, since by the time of decision all rights under the contract for the sale of wood-heels were extinguished, an injunction was superfluous and the question of protection from putative future conduct of the union had become moot. Furthermore it is significant that the sole ground given for the issuance of an injunction in the principal case is that the plaintiff, who is, under the provisions of the Massachusetts Constitution, entitled to some remedy for any wrong done him,[12] had waived his right to damages. But it could hardly have been contemplated under the Massachusetts Constitution that plaintiffs could waive the customary remedies provided by law and then appeal to equity for extraordinary relief. In view of the long and severe criticism to which the issuance of injunctions in labor disputes has been subjected,[13] it is somewhat startling to find a court suggesting a procedure which would obviate the traditional necessity for the plaintiff to prove the inadequacy of his remedy at law, and which would confer upon plaintiffs the option of suing for damages or of waiving the damages and then obtaining injunctive relief. The injunction granted in the principal suit, furthermore, has the unfortunate effect of depriving the union of all opportunity to bring suit in equity to enforce its contract with the shoe manufacturer forbidding the use of non-union wood-heels, a result which leaves the union with the single remedy of damages against the shoe manufacturer for breach of contract as its only relief. Since damages on such a cause of action could hardly be measured, and since the injury suffered by the union seems irreparable in the equity sense, the instant case in effect denies the union any but nominal relief.

The practical consequences of the decision in the principal case, denying labor the privilege of extending its influence by means of collective bargaining, if other con-

9. Hoban v. Dempsey, 217 Mass. 166, 104 N. E. 717 (1914); Shinsky v. O'Neil, 232 Mass. 99, 121 N. E. 790 (1919); Ryan v. Hayes, 243 Mass. 168, 137 N. E. 344 (1922). Cf. Berry v. Donovan, 188 Mass. 353, 74 N. E. 603 (1905); Shinsky v. Tracey, 226 Mass. 21, 114 N. E. 957 (1917), in which the discharged employees were allowed to recover damages. See Comment (1932) 45 HARV. L. REV. 1226.

10. See 1 POMEROY EQUITY JURISPRUDENCE (4th ed. 1918) §§ 176, 179 for the usual statement of the rule that the inadequacy of the remedy at law is the universal prerequisite to injunctive relief on a legal cause of action.

11. The contract involved was a single one for a fixed number of wood-heels. Damages for its breach could easily be proved, and recovered from the shoe-manufacturer who breached it, or from the union if a valid cause of action could be worked out.

12. Service Wood Heel Co. v. Mackesy, 199 N. E. 400 (Mass. 1936) at 403, citing Massachusetts Constitution: "Every subject . . . ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs . . ." For arguments, not mentioned in the instant case, in favor of injunctions in actions for inducing breach of contract see Comment (1918) 31 HARV. L. REV. 1017.

13. See Field, C. J. dissenting in Vegelahn v. Guntner, 167 Mass. 92, 100, 44 N. E. 1077, 1078 (1896). Clayton Act § 20, 38 STAT. 738, (1914), 29 U. S. C. A. § 52 (1926); Federal Anti-injunction Act, 47 STAT. 70 (1932), 29 U. S. C. A. § 101 (1935), and similar state legislation. FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930).

tracts are breached thereby, are such as to make it possible for an employer to promise a union to employ only union-produced materials, doubtless obtaining some concession of value from the union in return, and then to violate this agreement with relative impunity through the simple device of a suit brought by his supply house to enjoin action by the union to enforce its contract. The use of long-term and option contracts may often make futile the efforts of unions to strengthen their position.[14] Combined with the opportunity now offered for unfair tactics on the part of employers is the added disadvantage of having labor disputes, voluntarily settled to the satisfaction of the parties immediately involved, subjected to judicial interference. Intervention of the courts may often reopen the entire conflict and impose upon the community the delicate task of negotiating further in fields where a hard-won composition of difficulties had already been secured.

RIGHT OF RESCINDING BUYER TO DAMAGES UNDER THE SALES ACT[1]

THE plaintiff, a dealer in produce, purchased a refrigerator from the defendant, relying upon the latter's representation that the refrigerator would maintain a specified temperature. Upon the failure of the refrigerator to meet the required standards, an action was brought to recover the purchase price and also to obtain compensation for the produce destroyed as a result of the refrigerator's incapacity. The court allowed recovery on both counts,[1] resting its decision on the fact that in this case the claim for damages was not inconsistent with the suit for rescission and restitution, and that the Sales Act[2] does not prevent the recovery of both purchase price and damages where both are necessary to restore the plaintiff to status quo. To refute the contention that these two causes of action were inconsistent the court argued firstly that there was present in the case no element of double damages or unjust enrichment,[3] since the loss of the produce could in no way be compensated for by a restitution of the purchase price, and secondly that the damages sought were based not on the breach of warranty but rather on a contract to indemnify the plaintiff against all loss, an agreement which was implied from the defendant's representations of quality and which, being collateral to the contract of sale, it was said, survived the rescission. The court further supported its decision by stating that an action for damages apart from an action for a return of the purchase price could be based on the defendant's deceit.

At common law a buyer could not both rescind the contract and at the same time recover damages, the rule being based on the apparent inconsistency[4] between rescis-

14. Compare the opening left to the employer to protect himself by contract in Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 79, 159 N. E. 863, 868 (1928), which was immediately seized upon, though rendered ineffective in Interborough Rapid Transit Co. v. Green, 131 Misc. 682, 227 N. Y. Supp. 258 (Sup. Ct. 1928).

1. Waldman Produce, Inc., v. Frigidaire Corp., 284 N. Y. Supp. 167 (App. Term, 2nd Dep't 1935).

2. UNIFORM SALES ACT §§ 69, 70, 73; NEW YORK PERSONAL PROPERTY LAW, §§ 150, 151, 154.

3. From an equitable standpoint, the possible unjust enrichment of the plaintiff should be the sole reason for denying him more than one remedy. The courts, however, seem to be guided less by the equities of the situation than by the rules which forbid the giving of remedies which are logically inconsistent. Comment (1923) 36 HARV. L. REV. 593.

4. Taylor v. Yates Mach. Co., 208 Ala. 528, 94 So. 588 (1922); Church v. Baumgardner, 46 Ind. App. 570, 92 N. E. 7 (1910); Houser & Haines Mfg. Co. v. McKay, 53 Wash. 337,

sion, which involves a complete repudiation of the original contract,[5] and a claim for damages which must be based on a valid and subsisting contract.[6] Either of these two remedies will in the great majority of cases fully compensate the purchaser-plaintiff. Damages will theoretically place him in the same condition he would have occupied had the contract been fully performed by the seller.[7] Rescission, being predicated on the principle that both parties are to be restored to the positions they occupied prior to the making of the contract, likewise ordinarily compensates the wronged party for all injuries incurred.[8] An injured buyer if he elects to rescind must return, or offer to return, to the seller everything that he has received under the contract before he is entitled to restitution of the purchase price. Yet the return of the purchase price will not compensate the buyer for any incidental losses he may have suffered as a consequence of the seller's misrepresentations.[9] To avoid hardship in such cases, many courts at common law engrafted exceptions on the general rule and in an action for rescission allowed the recovery of damages to the extent that they were necessary to place the buyer in statu quo.[10] Since, however, the traditional theory that rescission disaffirms the contract from the beginning was incompatible with the recovery of damages on the contract, those courts were compelled to impose liability in damages on some basis independent of the contract. Tort liability for fraud in the defendant's representations has provided one of the more frequent solutions;[11] yet it has been held that even such an

101 Pac. 894 (1909); see Blake-Rutherford Farms Co. v. Holt Mfg. Co., 70 Wash. 192, 193, 126 Pac. 418, 419 (1912); 2 WILLISTON, SALES (2d ed. 1924) § 612. Before the Sales Act about one half the states allowed rescission for a mere breach of warranty. Rescission was almost invariably allowed in the case of fraud. Williston, *Rescission for Breach of Warranty* (1903) 16 HARV. L. REV. 465.

5. 1 BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) § 1.

6. Phares v. Jaynes Lumber Co., 118 Mo. App. 546, 94 S. W. 585 (1906); MARIASH, SALES (1930) § 349. As is made clear by the principal case, however, an added cause of "inconsistency" in remedy, once a basis for the recovery of damages is discovered, may arise from the element of double damages or unjust enrichment present if the purchase price is recovered as well as the difference in value between the chattel as delivered and as warranted

7. Thus a buyer may recover not only the difference in value of the chattel as delivered and as contracted for but also any incidental losses he may have suffered, if these could be said to have been within the contemplation of the parties. Skoog v. Mayer Bros. Co., 122 Minn. 209, 142 N. W. 193 (1913); Davidson Bros. Co. v. Smith, 143 Iowa 124, 121 N. W. 503 (1909); 2 SEDGWICK, DAMAGES (9th ed. 1912) § 759; 3 WILLISTON, CONTRACTS (1920) §§ 1391, 1393. If the chattel is worthless to the buyer, however, he will be inconvenienced by the necessity of reselling it in order to receive full compensation.

8. 3 BLACK, op. cit. *supra* note 5, § 561; cf. RESTATEMENT, CONTRACTS (1932) § 347. It has been suggested that since a buyer in the case of a breach of warranty has the election either to rescind the contract or to sue for damages, he cannot complain if he chooses the least remunerative of the two remedies. 2 WILLISTON, loc. cit. *supra* note 4. It seems probable, however, that in many instances a buyer does not consciously elect between his two remedies. In such cases, the rule leads to inequitable results.

9. In such a case the party at fault is returned to status quo while the innocent party suffers a loss.

10. SALMOND AND WINFIELD, CONTRACTS (1927) 237, 267; Rogge, *Damages upon Rescission for Breach of Warranty* (1930) 28 MICH. L. REV. 26.

11. McRae v. Lonsby, 130 Fed. 17 (C. C. A. 6th, 1904); Faris v. Lewis, 41 (2 B. Mon.) Ky. 375 (1842); Warren v. Cole, 15 Mich. 265 (1867); Ruben v. Lewis, 20 Misc. Rep. 583, 46 N. Y. Supp. 426 (Sup. Ct., App. Term, 1897); American Pure Food Co. v. Elliott, 151 N. C. 393, 66 S. E. 451 (1909); Fields v. Brown, 160 N. C. 295, 76 S. E. 8 (1912);

action is inconsistent with the absolute repudiation of the contract which is essential to rescission.[12] Some courts, moreover, ignoring the inconsistency, have taken the broad view that, since rescission is a remedy equitable in origin, damages should be allowed the buyer in cases where rescission alone would not place him in statu quo;[13] others retain the simple alternatives of the theory but succeed in awarding what are in fact damages, along with rescission, by virtue of a factual distortion of the cases. Damages for incidental expenses such as freight charges, for example, have been recovered by enlarging the concept of the "purchase price"[14] which is to be returned to the rescinding buyer. The same result has occasionally been achieved by allowing the recovery of expenses or damages said to be within the contemplation of the parties or necessarily incidental to the contract.[15] In such cases usually no further reasons in justification of recovery are stated, and it seems probable that the courts are referring to, and basing the recovery of damages on the contract of sale which according to the theory does not survive rescission.

Under the Sales Act, as at common law, it is clear that damages for breach of warranty cannot be recovered along with rescission. Section 69 gives the buyer four remedies in cases where there has been a breach of warranty,[16] and Section

Hart-Parr Co. v. Duncan, 75 Okla. 59, 181 Pac. 288 (1919); Holland v. Western Bank & Trust Company, 56 Tex. Civ. App. 324, 118 S. W. 218 (1909); see Dietrich v. Badders, 27 Del. (4 Boyce) 499, 507, 90 Atl. 47, 51 (1913).

12. This theory is grounded upon the supposition that an action for fraud must needs be based on the fact that the plaintiff was induced to enter into a transaction to his damage, which is inconsistent with an assertion of the nullity of the transaction. Church v. Baumgardner, 46 Ind. App. 570, 92 N. E. 7 (1910); 3 BLACK, op. cit. *supra* note 5, § 562, 2 WILLISTON, op. cit. *supra* note 4, § 648b. It can, however, be argued that an action for fraud or deceit is based wholly on the grounds of tort, which source of liability is distinct from that arising from the breach of warranty. See cases cited *supra* note 11; Comment (1933) 33 COL. L. REV. 1426.

13. Holland v. Western Bank & Trust Co., 56 Tex. Civ. App. 324, 118 S. W. 218 (1909); Hill v. Stephen Motor & Aero Co., (1929) 3 D. L. R. 676; 3 BLACK, op. cit. *supra* note 5, §§ 561, 695; (1930) 43 HARV. L. REV. 328.

14. Houser & Haines Manufacturing Co. v. McKay, 53 Wash. 337, 101 Pac. 894 (1909); see International Harvester Co. v. Tjentland, 181 Iowa 940, 947, 165 N. W. 180, 182 (1917).

Recovery of damages has also been allowed on quasi-contractual grounds where the buyer, before discovering the breach of warranty, had improved the chattel, which improvement would be of the benefit to the seller once the chattel was returned to him. Vernam v. Wilson, 31 Pa. Super. Ct. 257 (1906); see Mundt v. Simpkins, 81 Neb. 1, 3, 115 N. W. 325, 326 (1908).

15. Berkey v. Lefebure, 125 Iowa 76, 99 N. W. 710 (1904) (feed and care of a horse); Lake v. Western Silo Co., 177 Iowa 735, 158 N. W. 673 (1916) (expenses in erecting a silo); King Bros. v. Perfection Block Machine Co., 81 Kan. 809, 106 Pac. 1071 (1910) (expenditures necessarily made in anticipation of performance, i.e., building a shack to house a machine); Whiting Co. v. White Lead Works, 58 Mich. 29, 24 N. W. 881 (1885) (insurance, freight, and necessary testing); Alexander v. Walker, Tex. Civ. App., 239 S. W. 309 (1922) (feed and care of cattle); see Kester Bros. v. Miller Bros., 119 N. C. 475, 478, 26 S. E. 115, 116 (1896) (delay caused by defective engine and cost of excessive fuel).

16. The buyer may keep the goods and sue on the breach of warranty either by way of recoupment in diminution of the purchase price or sue for damages by way of counterclaim. If property in the goods has not yet passed, the buyer may refuse to accept them and sue for damages for breach of warranty, or if property has passed the buyer

69(2) makes these remedies exclusive by stating that once the buyer has been granted relief in any one of these ways no further remedy can be had.[17] Yet it is not so clear that the Sales Act prevents the recovery of special damages suffered by the buyer. It might be argued as does the principal case that, since Section 69 is entitled "Remedies for Breach of Warranty," subsection (2) merely denies, in an action for rescission, the recovery of damages for breach of warranty, but does not prevent the recovery of damages after rescission on some other theory.[18] This position that damages can be obtained if based on grounds independent of the contracts of warranty and sale finds further support in Section 70, which, inasmuch as it provides that special damages can be recovered in all cases where they are recoverable at common law, can be interpreted as perpetuating the exceptions to the common law rule.[19] It may be argued more plausibly, however, that this section was designed only to make clear that the rule of special damages established by *Hadley v. Baxendale*[20] still applies in suits for breach of warranty under the Sales Act, and, therefore, that it does not contemplate the recovery of special damages along with rescission.[21] In this controversy over the proper interpretation of the Sales Act, recourse may also be had to Section 73 which provides that the common law rules relating to fraud and misrepresentation shall continue to apply in all cases not provided for in the Act. This latter section may permit the recovery of damages along

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may rescind the contract, return the goods to the seller and recover what he has paid for them.

As to when property passes see Uniform Sales Act §§ 17-22. Where property in the goods has not yet passed, the buyer can recover such damage as will place him in the same position he would have occupied had the seller's contract or warranty been fulfilled. Gotham Nat. Bank v. Sharood Co., 23 F. (2d) 567 (C. C. A. 2d, 1928); Sussman v. Mitsui & Co., 114 Wash. 294, 195 Pac. 3 (1921). Tompkins v. Lamb, 121 App. Div. 366, 106 N. Y. Supp. 6 (App. Div., 3rd Dep't 1907) is an excellent example of how far some courts are willing to go to protect the buyer by holding that property in the goods has not yet passed.

17. Impervious Products Co. v. Gray, 127 Md. 64, 96 Atl. 1 (1915); Henry v. Rudge & Guenzel Co., 118 Neb. 260, 224 N. W. 294 (1929); Gerli & Co. v. Mistletoe Silk Mills, 80 N. J. L. 128, 76 Atl. 335 (Sup. Ct. 1910); Oetjen v. Whitehead Metal Products Co. Inc., 126 Misc. Rep. 369, 213 N. Y. Supp. 600 (Sup. Ct. App. Term., 1st Dep't 1926); 2 WILLISTON, loc. cit. *supra* note 4.

18. For cases allowing the recovery of damages along with rescission under the Sales Act see United Engine Co. v. Junis, 196 Iowa 914, 195 N. W. 606 (1923); Granette Products Co. v. Neumann, 200 Iowa 572, 205 N. W. 205 (1925); National Sand & Gravel Co. Inc., v. Beaumont Co., 156 Atl. 441 (N. J. Sup. Ct. 1931); International Harvester Co. of America v. Olson, 62 N. D. 256, 243 N. W. 258 (1932). Only one of these (National Sand & Gravel Co. Inc. v. Beaumont Co.) actually mentions § 69 of the UNIFORM SALES ACT, but it ignores the presence of § 69(2).

19. Rogge, *supra* note 10, at 44; (1926) 26 COL. L. REV. 240. Cf. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930) 431. This interpretation of § 70 has apparently not been employed heretofore by the courts.

20. 9 Exch. 341 (1854).

21. 2 WILLISTON, op. cit. *supra* note 4, § 616. Cf. Queen Incubator Co. v. Merrill Co., 21 Ohio App. 482, 153 N. E. 272 (1926); J. L. Latture Equipment Co. v. Gruendler Patent Crusher & Pulverizer Co., 133 Ore. 421, 289 Pac. 1067 (1930).

It would moreover appear that the damages sustained by the plaintiff might well be termed general, since a defective refrigerator might naturally be expected to cause the loss of the produce. Cf. Cary v. Harris, 178 N. C. 624, 101 S. E. 486 (1919). If such were the case, § 70 would not be applicable under any construction.

with rescission if those damages are based on tort rather than on the breach of warranty, but this interpretation appears to be tenuous and is negatived by the more plausible construction of the section as one designed merely to apply to those matters not otherwise dealt with in the Act.[22]

The court, in the instant case, seeking a basis of liability independent of the repudiated contract, did not make use of the exceptions evolved to allow damages before the Sales Act. Although the court did advert to a possible liability on grounds of fraud, it chose to rely squarely on a contract of indemnity which it implied from the seller's misrepresentations in inducing the contract. Such a theory may perhaps not differ widely from the one employed at common law allowing recovery where the damages sustained were said to be within the necessary contemplation of the parties; yet the implication of a separate contract of indemnity provides a novel legal artifice by which the desired recovery of damages may be rationalized and the general rule against inconsistency of causes of action avoided. There is, however, no obvious factual basis for the implication of an indemnity contract; and even if such a contract is recognized there appears to be no reason why it should survive rescission when a contract of warranty does not. Since the proper construction of the Sales Act in cases of this character is in doubt, and since the few cases available as precedent are almost evenly split,[23] the conclusion reached by the court in the principal case seems to be a justifiable one, especially where the equities favor the buyer who has been misled to his prejudice and where the buyer is not unjustly enriched by an award of damages which place him in a position more favorable than that which he occupied prior to the sale.[3]

Subtenant's Duty to Pay Rent After Surrender of the Main Lease*

Where a lessee surrenders his leasehold to the landlord, the common law theory was that the estate of the lessee merges in the landlord's reversion. Where, however, the lessee has subleased the premises before such a merger, it was held that, although the sublessee retains all of his rights under the sublease,[1] the obligations imposed by the subleasing contract upon the sublessee, including the duty to pay rent, are discharged.[2] The preservation of the sublessee's rights under the lease may be explained either as a disparagement of the doctrine of merger or as a consequence of the lessee's disability to surrender to the landlord that part of his estate which he has already alienated to the sublessee.[3] On the other hand, the sublessee's

22. 2 Williston, op. cit. *supra* note 4, § 617.

23. See cases cited *supra* notes 17 and 18.

*Noting Metropolitan Life Ins. Co. v. Hellinger, 246 App. Div. 7, 284 N. Y. Supp. 432 (1st Dept. 1935).

1. Mellor v. Watkins, L. R. 9 Q. B. 400 (1874); Eten v. Luyster, 60 N. Y. 252 (1875); Tiffany, Real Property (2d ed. 1920) 210.

2. Thre'r v. Barton, Moore 94 (K. B. 1570); Webb v. Russell, 3 T. R. 393 (K. B 1789); cf. Buttner v. Kasser, 19 Cal. App. 755, 127 Pac. 811 (1912); see Bailey v. Richardson, 66 Cal. 416, 422, 5 Pac. 910, 914 (1885); Appleton v. Ames, 150 Mass. 34, 42, 22 N. E. 69, 70 (1889); McDonald v. May, 96 Mo. App. 236, 244, 69 S. W. 1059, 1061 (1902); Krider v. Ramsay, 79 N. C. 354, 358 (1878); Hessel v. Johnson, 129 Pa. 173, 178, 18 Atl. 754, 755 (1889); Jones, Landlord and Tenant (1906) §§ 429, 659; Taylor, Landlord and Tenant (9th ed. 1904) §§ 517, 518; 2 Thompson, Real Property (1924) § 1644; Tiffany, Real Property (2d ed. 1920) 211, 1492.

3. The result is otherwise, however, when the main lease is forfeited for breach of its covenants, or otherwise terminated according to its terms, for the rights of the sublessee as against the landlord can rise no higher than those of the main lessee. Appleton v.

obligation to pay rent is said to be discharged both because it was incident to the main lessee's reversion, which has been merged in the greater estate of the landlord, and because, as between landlord and sublessee, no action would lie,[4] neither privity of contract nor privity of estate being existent between them.[5] This situation was changed in England by a statute of 1730 which provided that the obligations of the sublessee should not be impaired by a surrender of the main lease which is followed by a renewal.[6] A similar statute enacted in 1845 applies to all surrenders of the main lease.[7] In New York, the former act was adopted in 1774, but the latter has never been enacted.[8]

The principal support in the United States for the common law doctrine is *Buttner v. Kasser,* which was an action by the landlord to recover compensation from the sublessee for use and occupation of the premises after surrender of the main lease.[9] The plaintiff there based his case upon the assumption that he could not recover on the sublease. While the court conceded this to be true, it refused to allow a quasi contractual recovery for use and occupation, its theory being that a sublessee who held under a valid lease should not be subjected to any action except a suit brought upon the lease. Although the *Buttner* decision concluded that the landlord was remediless, other courts have been able to avoid that harsh result in at least three ways. In one instance this was accomplished by holding that the payment of rent directly to the landlord with knowledge of the main lessee's surrender was an attornment, which left the sublessee bound by the terms of his sublease.[10] And a Massachusetts court allowed the landlord to collect rent from the sublessee after a surrender of the main lease on the ground that the parties had intended the rent and the reversion to be separately assigned,[11] that such separate assignment was possible and that it would result in the preservation of the sublessee's duty to pay rent despite merger of the main lessee's reversion in the lessor's estate.[12] Moreover, at least two courts of equitable jurisdiction have avoided the rigorous common law

Ames, 150 Mass. 34, 22 N. E. 69 (1889); Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123 (1895); see Eten v. Luyster, 60 N. Y. 252, 258 (1875).

4. Historically, assumpsit would not lie for use and occupation. See Ames, *Assumpsit for Use and Occupation* (1889) 2 HARV. L. REV. 377; KEENER, QUASI CONTRACTS (1893) 191. But now an action is probably maintainable against a sublessee who remains in possession after termination or even after surrender of the main lease. See Christatos v. United Cigar Stores, 258 N. Y. Supp 586 (App. Div. 1st Dept., 1932).

5. In this respect, sublease is different from assignment, for when a lessee assigns (i.e., retains no reversion) privity is transferred, so that the landlord may maintain an action against the assignee exactly as against the assignor. Stewart v. Long Island Rr. Co., 102 N. Y. 601, 8 N. E. 200 (1886); see (1925) 34 YALE L. J. 913; Comment (1925) 23 MICH. L. REV. 788.

6. 4 GEO. II, c. 28 § 6 (1730). 7. 8 & 9 VICT. c. 106 § 9 (1845).

8. NEW YORK REAL PROPERTY LAW § 226 (1909).

9. 19 Cal. App. 755, 127 Pac. 811 (1912); Comment (1913) 13 COL. L. REV. 245; (1913) 26 HARV. L. REV. 458.

10. McDonald v. May, 96 Mo. App. 236, 69 S. W. 1059 (1902).

11. Beal v. Boston Car Spring Co., 125 Mass. 157 (1878).

12. This is a theory of recovery which might have been equally available when the King's Bench adopted the rule that surrender of the main lease relieved the sublessee of his obligation. For, the statement that rent can be separated from the reversion goes back at least to Coke. Co. LITT. *215. However, at common law rent could only be assigned under seal. TIFFANY, LANDLORD AND TENANT (1912) 1108. But surrender could be made orally until required to be in writing by the Statute of Frauds. 2 TIFFANY, REAL PROPERTY (2d ed. 1920) 1580.

rule upon the related theory that merger will not result where the parties do not so intend.[13] And since the normal intention of the parties to a surrender is not to relieve the sublessee of his obligation to pay rent, the result reached was that the subtenant continued to be bound to the landlord upon exactly the same terms under which he had formerly been obligated to the main lessee.

The importance of the intention of the parties likewise was revealed in an action recently brought in New York against a sublessee for the recovery of rent. In that case the sublessee, who was not liable for use and occupation because he vacated the premises immediately upon learning of the surrender of the main lease, alleged that the surrender of the main lease to the main lessor, plaintiff's assignor, had resulted in a merger which extinguished his duty to pay rent in accordance with the common law theory. The court, however, on plaintiff's motion to strike the sublessee's defense, refused to view this allegation as sufficient in law to defeat the action. With one judge dissenting, the court held that the contract of transfer between main lessor and main lessee could not only have no legal effect upon the continuance of the sublease, but that the parties to that transfer did not intend that the obligations of the sublease should in any way be disturbed.[14]

Although the doctrine of intention was thus adverted to, the court based its decision squarely upon the group of New York cases holding that the surrender of the main lease does not defeat the rights of the subtenants. But, in view of the distinction at common law between the effect of surrender upon a sublessee's rights and its effect upon his duties, to argue that these cases hold that the subtenant becomes the tenant of the original lessor after a surrender and that therefore the sublessee's duties are preserved is to ignore the English precedents, the textbooks, and the negative implication of the early New York statute, which applies only to those surrenders which are followed by renewals. Nevertheless some of the language used by the previous New York cases is inconsistent with the common law rationale,[15] and furnishes a basis for arguing that the courts of that state have altered to a considerable extent the former relationship between landlord and sublessee.[16] Although it is doubtful that the cases relied upon in the opinion intended to change the law, the instant decision indicates the adoption by judicial action of the desirable result attained in England by the statute of 1845.

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13. Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910 (1885); Hessel v. Johnson, 129 Pa. 173, 18 Atl. 754 (1889); see TIFFANY, REAL PROPERTY (2d ed. 1920) 92.

Although the theory of merger, whose real usefulness is in simplifying land titles by destroying future estates, has been extended by the law courts to logical limits which are beyond that function, merger is a doctrine which need not be applied in a court of equity so as to defeat the intentions of the parties and reach an inequitable result. Flanigan v. Sable, 44 Minn. 417, 46 N. W. 854 (1890); Bostwick v. Frankfield, 74 N. Y. 207 (1878).

14. Metropolitan Life Ins. Co. v. Hellinger, 246 App. Div. 7, 284 N. Y. Supp. 432 (1st Dept. 1935).

15. See Eten v. Luyster, 60 N. Y. 252, 259 (1875); Kottler v. New York Bargain House, 242 N. Y. 28, 37, 150 N. E. 591, 593 (1926); Kedney v. Rohrbach, 14 Daly 54, 56 (1886).

16. Although the statement is still made that there is no privity between landlord and sublessee, that formula was long ago broken down to the extent that the latter is allowed to protect himself against the effect of the insolvency of the main lessee by paying rent directly to the landlord. Peck v. Ingersoll, 7 N. Y. 528 (1852). See Comment (1925) 23 MICH. L. REV. 788.

FEDERAL EQUITY JURISDICTION TO PROTECT EMPLOYER'S UNION AGREEMENT AGAINST INTERFERENCE BY RIVAL LABOR ORGANIZATION[1]

IT IS somewhat paradoxical that the United Mine Workers of America, who have engaged in a bitter struggle against the yellow dog contract ever since the *Hitchman* case[2] was first presented to the courts, should, on the eve of its effective outlawry, contribute to its revival in a new form. In August, 1932, the United extended until March 31, 1933, a state-wide labor agreement with the Illinois Coal Operators' Association, of which the United Electric Coal Companies was a member. Dissatisfied with the wage-cut for which the contract provided, many members of the United seceded and organized the Progressive Miners of America. Ninety per cent or more of the workers in the United Electric Coal Companies' mine at Freeburg, Illinois, followed this movement, and thereupon sought to persuade the Freeburg owners to enter into a labor agreement with the Progressives. The owners claimed that their contract with the United precluded such action, but an agreement was reached in October, 1932, under which the Freeburg mine was operated with Progressives as employees. In December, the operators agreed with the United to extend the August contract two years to March 31, 1935. On March 31, 1933, when the original contract should have expired, the Freeburg employees, informed that the mine operators had extended the contract with the United and would not, therefore, enter into negotiations with the Progressives, went out on strike. Several attempts to open the mine over a period of two years were frustrated by mass picketing accompanied by violence. Injunctive relief sought by the operators was denied by the Federal District Court[3] because of the restrictions of the Norris-La Guardia Anti-Injunction Act.[4] The court made all the findings necessary to the issuance of an injunction under the Act,[5] except that the December contract with the United, entered into when most of the plaintiff's Freeburg employees were known by it to be Progressives, conflicted with the policy declared in the Act, inasmuch as it denied to those employees freedom to designate representatives of their own choosing for the purpose of collective bargaining,[6] and that the plaintiff was disqualified to seek relief because of its failure to make reasonable efforts to settle the dispute, as required by the Act.[7] The Circuit Court of Appeals for the Seventh Circuit reversed

1. United Electric Coal Companies v. Rice, 80 F (2d) 1 (C. C. A. 7th, 1935).

2. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229 (1917). The original injunction was granted in 1907. See 172 Fed. 963 (C. C. N. D. W. Va. 1909).

3. United Electric Coal Companies v. Rice, 9 F. Supp. 635 (E. D. Ill. 1934).

4. 47 STAT. 70 (1932), 29 U. S. C. A. §§ 101-115 (1935).

5. Before an injunction may be issued the court must make findings of fact to the effect—

> "(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, . . . ;
>
> "(b) That substantial and irreparable injury to complainant's property will follow;
>
> "(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;
>
> "(d) That complainant has no adequate remedy at law; and
>
> "(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." § 7, 47 STAT. 71 (1932), 29 U. S. C. A. § 107 (1935).

6. § 2, 47 STAT. 70 (1932), 29 U. S. C. A. § 102 (1935).

7. § 8, 47 STAT. 72 (1932), 29 U. S. C. A. § 108 (1935).

upon the ground that the real controversy was not between the plaintiff and the Progressives, but between the two unions, a conflict which the court did not consider to be a labor dispute within the scope of the Norris-La Guardia Act, so that the restrictions of the Act were inapplicable.[8] The court went further, however, and held that the plaintiff would be entitled to equitable relief even if the controversy were a labor dispute within the meaning of the Act. The evidence was reexamined to reverse the district court's finding that the employer had failed to make reasonable efforts to settle the dispute, the court holding that, since the employer was only incidentally a party to the real conflict between the two unions, and since it was bound by its contract with the United, there was nothing upon which it could compromise or arbitrate. In any case, the court held, the Act was not intended to prevent the plaintiff's seeking protection at any time, regardless of the stage of the peace negotiations, against acts of violence to its property. The Supreme Court has denied certiorari.[9]

Other discussions[10] have pointed out that the holding of the Circuit Court of Appeals that the instant case was not a labor dispute accords neither with the facts of the case nor with the terms of the Norris-La Guardia Act. A labor dispute is therein defined as any controversy concerning the "association or representation" of employees "regardless of whether or not the disputants stand in the proximate relation of employer and employee."[11] The further proviso that a case shall be held to involve a labor dispute whether it be between employer and employee or "between one or more employees or associations of employees and one or more employees or associations of employees"[12] seems to have been inserted for the specific purpose of including within the protection of the Act a dispute for recognition between two unions in the same trade or industry. The court's restriction of the Act to controversies between employers and employees concerning wages or conditions of employment constitutes a nullification of these provisions analogous to the judicial narrowing of the Clayton Act[13]—a result which the Norris Act had purposed to remedy.

More significant is the holding in effect that the employer's contract with the

8. The court premised its discussion with a statement that the Act is a constitutional exercise of the Congressional power to regulate the jurisdiction of the federal courts. United Electric Coal Companies v. Rice, 80 F. (2d) 1, 5 (C. C. A. 7th, 1935); see also Levering & Garrigues Co. v. Morrin, 71 F. (2d) 284 (C. C. A. 2d, 1934).

9. No. 708, March 2, 1936.

10. (1936) 36 COL. L. REV. 157; *Judicial Nullification of Anti-Injunction Acts* (Apr. 1936) 4 INT. JURID. ASS'N BULL. no. 11, p. 1.

11. § 13 (c), 47 STAT. 73 (1932), 29 U. S. C. A. § 113(c) (1935).

12. § 13(a), 47 STAT. 73 (1932), 29 U. S. C. A. § 113(a) (1935).

13. § 20, 38 STAT. 738 (1914), 29 U. S. C. A. § 52 (1926). See Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U. S. 37 (1927); International Organization, U. M. W. A., v. Red Jacket Consolidated Coal & Coke Co., 18 F. (2d) 839 (C. C. A. 4th, 1927); FRANKFURTER and GREENE, THE LABOR INJUNCTION (1930) 165 et seq. The final ground of the court's decision, that the Act does not deprive the federal judiciary of power to enjoin unlawful acts, notwithstanding that the complainent has made no efforts to settle the dispute, further drastically narrows the Act. Inasmuch as no injunction can issue in *any* case in the absence of unlawful acts, the section requiring negotiation is thus rendered nugatory. The Act was first limited even prior to the instant decision, by the exception of bankruptcy courts from its provisions. In re Cleveland and Sandusky Brewing Co., 11 F. Supp. 198 (N. D. Ohio 1935), noted (1935) 49 HARV. L. REV. 341; (1935) 45 YALE L. J. 372.

United relieved it from compliance with Section 8 of the Norris-La Guardia Act,[7] which denies injunctive relief in a case involving a labor dispute to any complainant who has failed to make every reasonable effort to settle its dispute by negotiation or arbitration. Negotiation under circumstances rendering impossible any compromise with the union was said to be futile.[14] The court viewed the contract with the United as inviolable, and refused to consider either the possibility that the union might be privileged in forcing its breach or that the employer itself might have the choice of breaking its contract and taking the consequences. The conclusion that Section 8 did not prohibit the issuance of an injunction in these circumstances in effect enunciates a doctrine surprisingly similar to the *Hitchman* principle—that an injunction will issue against a labor organization to protect an employer's rights arising out of contracts of employment. The primary purpose of the orthodox yellow dog contract—whereby the employee agreed not to join a labor union—was to enable the employer to obtain an injunction against attempts at union organization in his shop on the ground that the union was inducing his employees to breach their contracts with him.[15] This practice reached its climax in the *Red Jacket* case,[16] which crystallized a universal indignation against the "outrageous and unconscionable contract."[17] By declaring such agreements contrary to public policy and unenforceable,[18] the Norris-LaGuardia Act followed numerous other attempts[19] to eliminate the evils of the yellow dog system. Enjoining a striking union, however, on the ground that the employer's contract with a rival labor organization is binding upon him and precludes negotiation is to arrive by indirection at the result prohibited in the statutory declaration against yellow dog contracts.

It may be conceded that the effect of the employer's being forced to accede to the demands of the striking Progressives would be the breaking of its contract with the United, which would not only render it liable to an action for damages, but would also create the probability of a strike instituted by the United at its other mines. An employer who contracts in good faith for a reasonable period with a representative union would seem to have a just grievance against interference with his contractual rights by a rival union.[20] The operators in the instant case, however, may be said to have soiled their hands and brought their troubles upon themselves by renewing

14. The court did not consider the question of negotiations with the United. The terms of the contract with that union, however, would seem to indicate that it was not beyond the realm of probability that negotiation with it would result in some compromise or arrangement, inasmuch as the contract bound the operators to employ members of that union only "when available, and when in the judgment of the operator the applicant is competent." United Electric Coal Companies v. Rice, 9 Supp. 635, 638 (E. D. Ill. 1934).

15. SEIDMAN, THE YELLOW DOG CONTRACT (1932) 41.

16. International Organization, U. M. W. A., v. Red Jacket Consolidated Coal & Coke Co., 18 F. (2d) 839 (C. C. A. 4th, 1927).

17. Senator Borah, in the debate on the nomination of Judge Parker for the Supreme Court of the United States, 72 CONG. REC. 7937 (1930).

18. § 3, 47 STAT. 70 (1932), 29 U .S. C. A. § 103 (1935).

19. Erdman Act, § 10, 30 STAT. 428 (1898), declared unconstitutional in Adair v. United States, 208 U. S. 161 (1908), repealed, 38 STAT. 108 (1913), 45 U. S. C. A. § 125 (1928); FRANKFURTER AND GREENE, op. cit. *supra* note 13, at 146 et seq. The latest attempt is the amendment to the RAILWAY LABOR ACT, 44 STAT. 577 (1926), amended, § 2, 48 STAT. 1188 (1934), 45 U. S. C. A. § 152 (1935).

20. It was on this basis that yellow dog contracts were enforced. See Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 250-252 (1917); International Organization, U. M. W. A., v. Red Jacket Consolidated Coal & Coke Co., 18 F. (2d) 239, 849 (C. C. A. 4th, 1927).

their contract with the United at a time when that union was palpably unrepresentative of their employees. In any event, the fact that legitimate economic rivalry between *A* and *B* results in harm to *C* does not, in itself, constitute grounds for an injunction in *C's* favor,[21] any more than does the fact that the advancing of one's own interests necessarily interferes with the interests of others.[22] The incidental damage to which an employer may be subjected by reason of a struggle between two unions is no different from other disadvantages he may suffer as the result of a strike or as the consequence of competition.

The employer's interest in avoiding the damage consequent upon his acceding to the demands of a newly established union would, in the absence of statute, have to be balanced against the interest of the union in protecting and advancing the welfare of its members by obtaining the concession demanded. Some courts have refused to interfere in cognate conflicts between such opposing economic interests upon the theory that both employer and union are privileged to invade the interests of each other in the furtherance of legitimate objects.[23] But the issue raised by the instant case is not one alone of balancing conflicting interests. It is confined to the construction and application of a statute. If strikes are to be enjoined because they interfere with contractual relations between the employer and third parties, legitimate labor activities are again faced with that interference which the Norris-La Guardia Act sought to eliminate. Efforts of newly organized unions might be effectively curbed by the employer's contracting with an old established organization, as in the instant case,[24] with a company union,[25] or even, as in the yellow dog contract, with his employees individually, thereby forestalling any advance in the labor movement.[26] Besides thus circumventing the legislative declaration against yellow dog contracts,

21. Stillwell Theater v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932), noted (1932) 32 COL. L. REV. 1248; J. H. & S. Theaters v. Fay, 260 N. Y. 315, 183 N. E. 509 (1932); Kemp v. Division No. 241, 255 Ill. 213, 99 N. E. 389 (1912).

22. See Nann v. Raimist, 255 N. Y. 307, 174 N. E. 690 (1931); Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917); Nat. Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902); Carpenter, *Interference with Contract Relations* (1928) 41 HARV. L. REV. 728, 760.

23. Stillwell Theater v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932); Exchange Bakery v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927); Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 159 N. E. 863 (1928); see Kemp v. Division No. 241, 255 Ill. 213, 99 N. E. 389 (1912); Carpenter, *supra* note 22, at 745, 760. The Norris-LaGuardia Act may be said to have emphasized this privilege by definitely asserting a policy of judicial non-intervention in the field of labor disputes. Where, however, the purpose of the invasion, by means of strike or picketing, is not to better labor conditions, but merely to destroy the employer's business, no privilege exists, and an injunction may properly be issued. Auburn Draying Co. v. Wardell, 227 N. Y. 1, 124 N. E. 97 (1919); Stuhmer & Co. v. Korman, 241 App. Div. 702, 269 N. Y. Supp. 788 (1934), aff'd, 265 N. Y. 481, 193 N. E. 281 (1934).

24. The most recent labor agreement entered into by the United Mine Workers with the anthracite coal operators prohibits strikes during the lifetime of the contract. N. Y. Times, May 8, 1936, at 3, col. 5. It is interesting to speculate as to the effect of such a provision upon the doctrine of the instant case.

25. The court in the instant case stressed the fact that the United was not a company union, thereby creating the inference that were it such a different result might have obtained. But a few months later the same court reached the same conclusion notwithstanding the presence of a company union. Newton v. Laclede Steel Co., 80 F. (2d) 636 (C. C. A. 7th, 1935), aff'g Laclede Steel Co. v. Newton, 6 F. Supp. 625 (S. D. Ill. 1934).

26. See Stillwell Theater v. Kaplan, 259 N. Y. 405, 412, 182 N. E. 63, 66 (1932); Carpenter, *supra* note 22, at 758.

the condoning of such practices amounts to a repudiation of the general policy behind the Norris-La Guardia Act—that the worker shall have full freedom to designate representatives of his own choosing for the purpose of collective bargaining. The accepted principle of collective bargaining is rendered nugatory when the employer is allowed to deal with whatever labor organization he chooses and to enjoin another which claims to represent, or is seeking support among, his employees.[27]

EFFECT OF UNCORROBORATED EVIDENCE OF ACCOMPLICE AT PRELIMINARY HEARING.[1]

DEFENDANT was indicted in Montreal, Canada, in 1924 for murder but was released for want of sufficient evidence. Shortly thereafter, he left Canada and went to California where he assumed a fictitious name. In 1934, pursuant to the applicable extradition treaty, the Canadian government filed a complaint before the United States Commissioner for the Northern District of California, requesting a warrant for the apprehension of the defendant for extradition. Accordingly, a warrant was issued, defendant was arrested, and after a preliminary hearing was committed to jail to await an extradition order.[2] Defendant then petitioned the federal district court for a writ of habeas corpus on the theory that, since his connection with the murder was established solely by the testimony of an accomplice which was not corroborated, the evidence was insufficient to justify the order of commitment for extradition. The district court denied the petition for the writ, and on appeal this order was affirmed.

The extradition treaty involved in this case, which is typical of other extradition treaties, provides that at the preliminary hearing, which is a prerequisite to international extradition, the evidence of murder must be such as would justify commitment for trial in the place where the fugitive is found were the crime committed there.[3] It has uniformly been held that this proviso refers to the law of the par-

27. That the NATIONAL LABOR RELATIONS ACT, 49 STAT. 449, 29 U. S. C. A. §§ 151-166 (1935), can fully correct such a condition would appear doubtful. After an election for the determination of collective bargaining representatives, the doctrine of the instant case would seem to permit the employer to enjoin the activities of an incoming labor organization in order to protect its contract entered into pursuant to the election.

1. Curreri v. Vice et al., 77 F. (2d) 130 (C. C. A. 9th, 1935), cert. denied, 296 U. S. 638 (1935).

2. This procedure is set out in detail in the federal extradition statutes. 9 STAT. 302 (1884), 12 STAT. 84 (1860), 15 STAT. 337 (1869), 22 STAT. 215 (1882), 31 STAT. 656 (1900), 18 U. S. C. A. §§ 651-661 (1926). See also Reuschlein, *Provisional Arrest and Detention in International Extradition* (1934) 23 GEO. L. J. 37.

3. The Webster-Ashburton treaty between Great Britain and the United States provides: "It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them . . . deliver up to justice all persons who, being charged with the crime of murder . . . committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; . . ." 8 STAT. 576 (1842). This was taken from the Jay treaty with Great Britain in 1794. 8 STAT. 116. The proviso clause has been repeated in substantially the same form in nearly all United States extradition treaties. See e.g. treaties with Argentina, 31 STAT. 1883 (1896); France, 37 STAT. 1526 (1909); Germany, 47 STAT. 1862 (1930); Italy, 15 STAT. 629 (1868); Japan, 24 STAT. 1015

ticular state in which the fugitive is apprehended rather than to the federal law.[4] Consequently, the principal case, though it may seem to concern extradition exclusively, is in reality a decision upon the California law of preliminary hearings.[5]

Because of the complexity of a modern criminal trial and the consequent difficulty of arranging it upon brief notice, there is necessarily a considerable interval of time between the arrest of an accused and a final adjudication of his guilt. While it is obviously in keeping with the public policy of the state to keep him in jail during this interval should he actually be guilty, the resultant hardship to the defendant is obviously unjust if he be innocent. To reconcile somewhat this conflict of policies, the statutes of the various states usually provide that one who is arrested has a right to a preliminary examination before a magistrate, so that it may be determined whether there is "probable cause" to believe him guilty.[6]

The testimony of an accomplice[7] at trial has long been regarded with disfavor and suspicion on the theory that a guilty man may attempt to implicate another falsely because of desire for revenge or hope of clemency.[8] Thus, in the early English law, it was customary for the judge to caution the jury to weigh such testimony with particular care. However, since this was a counsel of caution rather than a conclusive rule of evidence, the jury was privileged to convict on such evidence though it was uncorroborated.[9] Though approximately one-half of the American jurisdictions have retained this old common law rule, other states, including California, have provided by statute that the uncorroborated evidence of an accomplice is never sufficient for conviction,[10] and thus have gone beyond the old rule which disfavored such evidence, but permitted conviction on the basis of it.

Though the law in each state is settled on the effect of such evidence at trial, few cases assess the weight to be given it at a preliminary hearing before the magistrate, where the question is whether such testimony is sufficient to indicate "probable cause." It seems clear that it should be sufficient for purposes of the preliminary

(1886); Spain, 35 STAT. 1947 (1904); see also Hyde, *Notes on the Extradition Treaties of the United States* (1914) 8 AM. J. INT. L. 487.

4. Wright v. Henkel, 190 U. S. 40 (1903); Pettit v. Walshe, 194 U. S. 205 (1904); McNamara v. Henkel, 226 U. S. 520 (1913). Cf. Charlton v. Kelly, 229 U. S. 447 (1913); Collins v. Loisel, 259 U. S. 309 (1922); Factor v. Laubenheimer, 290 U. S. 276 (1933); (1934) 34 COL. L. REV. 177; 4 Op. Atty. Gen. (1844) 330.

5. This note does not concern interstate extradition. In interstate extradition or rendition, the issuance of the warrant makes a prima facie case that the accused is a fugitive from justice. There is no preliminary hearing to determine probable guilt. See 2 MOORE, EXTRADITION (1891) § 610; Comment (1934) 43 YALE L. J. 444; (1914) 14 COL. L. REV. 665; (1933) 11 N. C. L. REV. 163.

6. See CLARK, CRIMINAL PROCEDURE (2d ed. 1918) § 35; 1 WHARTON, CRIMINAL PROCEDURE (10th ed. 1918) § 114. At the early common law, a similar rule prevailed. See 4 BL. COMM. § 296.

7. An accomplice is usually defined either as one who is indictable for the same offense as is the principal, or as one who has been concerned in the commission of the crime either directly or indirectly. See (1930) 21 J. CRIM. L. 446.

8. See 2 WHARTON, CRIMINAL EVIDENCE (11th ed. 1935) §§ 728, 730.

9. See 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2056.

10. See 4 WIGMORE, EVIDENCE § 2056; (1929) 14 IOWA L. REV. 479. This statutory rule has been criticized on the ground that only a judge with complete discretion can adequately handle a subject as varied as the credibility of an accomplice's testimony, which necessarily must vary with the reasonableness of the story, with the personality of the individual, and finally with the nature of the crime. See UNDERHILL, CRIMINAL EVIDENCE (4th ed. 1935) § 156.

hearing in the states in which conviction can be had on such evidence, though there are no reported cases on this point.[11] The few reported cases concern its effect upon preliminary hearings on the issue of "probable cause" in the states in which statutes prohibit conviction on such evidence. In these decisions, two conflicting views are presented. On the one hand, it has been held that it is unfair to hold a person on testimony which is admittedly insufficient to convict since the effect is to keep one in jail upon a mere speculation or a hope that evidence may later be found to corroborate that of the accomplice.[12] On the other hand, it is contended that there is a necessary distinction between the evidence necessary to hold and to convict, since the purpose of the preliminary hearing is not to establish guilt with persuasive force, but merely to indicate a probability of guilt.[13] The latter doctrine, that the uncorroborated evidence of an accomplice is sufficient at preliminary hearing to establish probable cause, though insufficient at trial to sustain a conviction, receives considerable strength from its acceptance in the instant case.[14] Its adoption seems desirable, since it subjects to trial individuals who may be convicted despite the present weakness of the evidence against them, and who would go free under any alternative rule; and it will result in unjust imprisonment pending trial only in the rare cases where the evidence of the accomplice is completely false, and the accused is unable to produce evidence demonstrating his innocence.

11. The English rule that the uncorroborated evidence of an accomplice is sufficient to convict is followed in Canada. K. v. Boycal and Ballan, 31 Que. K. B. 391 (1920); see CRANKSHAW'S CRIMINAL CODE OF CANADA (6th ed. 1935) §§ 1002, 1014, comment to § 1014 at page 1214. Hence, it is interesting to note that had the defendant been arrested in Canada, no question as to the sufficiency of the evidence to justify commission for trial would have arisen.

12. State v. Smith, 138 Ala. 111, 35 So. 42 (1903); Ex Parte Oxley, 38 Nev. 379, 149 Pac. 992 (1915).

13. Ex parte Schwitalla, 36 Cal. App. 511, 172 Pac. 617 (1918); People ex rel. Giallarenzi v. Munro, 150 Misc. Rep. 41, 268 N. Y. Supp. 404 (Sup. Ct. 1934). Cf. Ex parte Glaser, 176 Fed. 702 (C. C. A. 2d, 1910); McCurdy v. State, 39 Okla. Cr. Rep. 310, 264 Pac. 925 (1928). Though a Pennsylvania statute prohibits conviction for the seduction of a female by a promise of marriage when the testimony of the seduced female as to the promise is not corroborated, it has been held that at preliminary hearing no corroboration is necessary. In re Dubroca y Paniagua, 33 F. (2d) 181 (E. D. Pa. 1929).

14. It should be observed, however, that since the instant case and all others so holding concern solely the appeal of an accused from a magistrate's order of commitment rather than appeal by the state from an order of discharge, these cases are authority only for the rule of law that the uncorroborated evidence of an accomplice is sufficient to justify a magistrate's order of commitment. They do not determine that a magistrate must commit on such evidence.